

No. 13226

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United States  
Court of Appeals  
for the Ninth Circuit.

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UNITED STATES OF AMERICA,

Appellant,

vs.

JOHN PHILLIP WHITE,

Appellee.

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Transcript of Record  
In Two Volumes  
Volume II  
(Pages 93 to 355)

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Appeal from the United States District Court for the  
Northern District of California,  
Southern Division. AUG 27 1952

PAUL P. O'BRIEN  
CLERK



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Appeal from the United States District Court for the  
Northern District of California,  
Southern Division.



In the Southern Division of the United States  
District Court for the Northern District of  
California

No. 27740

Before: Hon. George B. Harris, Judge.

JOHN PHILLIP WHITE,

Plaintiff,

vs.

THE UNITED STATES OF AMERICA,

Defendant.

REPORTER'S TRANSCRIPT

November 2, 1950

Appearances:

For the Plaintiff:

LEONARD J. BLOOM, ESQ., and

M. S. HUBERMAN, ESQ.

For the United States:

RUDOLPH J. SCHOLZ, ESQ.,

Assistant United States Attorney.

The Clerk: John Phillip White vs. The United States of America, on trial.

Mr. Bloom: Ready. If your Honor please, a brief statement may be of some assistance to the Court, and with your permission I would like to say a few preliminary words. My name is Leonard Bloom. I am of counsel for the plaintiff and this is my associate, Mr. Huberman.

This is an action, if your Honor please, brought under the Federal Tort Claims Act. The first amended complaint which is on file sets forth that this accident occurred on November 18 of the year 1946 at an Army installation, Camp Beale near Marysville, California. It also sets forth the plaintiff, John Phillip White, at the time of this accident, was an employee of a copartnership known as the Mars Metal Company, that the Mars Metal Company had entered into a contract with the United States Government through the Quartermaster Corps of the Army for the purchase of scrap metal at Camp Beale. The contract, which, of course, will be offered in evidence, is a simple contract on the government form for the purchase of metal at a stipulated price. The invitation to bid and the acceptance, in accordance with the government practice, are all contained in the one document. The contract—and I think this is of considerable importance—was for the purchase of bullet metals embedded in target butts at Camp Beale, California, and the contract went on to say that this did include the right to [2\*] gather all non-ferrous metals on ranges from firing line to points at which unstocked bullets might fall, to be paid for at contract price, for bullet metals.

And then in the attached additional provisions, with the term “alternate” Article E provides for the removal of the scrap metal, and says, “The contractor will be required to recover, using his own equipment and personnel without any expense to the Government, and will deliver the same to the

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\*Page numbering appearing at top of page of original Reporter's Transcript of Record.

Post salvage officer where the metals will be weighed prior to final delivery to the contractor," et cetera.

There is nothing in this contract about any assumption of risks or warnings to the personnel or to the contracting parties, unlike a revised government form which now so provides. In any event, the plaintiff White was an employee of the copartnership. He went up there to Camp Beale. He went on the strafing range. That is the range used by aircraft to practice against targets known as a strafing range, and with the permission of the Army he had the assistance of three army men who were off duty and who were paid by the contractor who assisted him in the collection of this nonferrous metal. And while so engaged, one of these army men—I believe he was a sergeant off duty—picked up the projectile in question, which was a dud, unexploded, that is, and tossed or handed it to White, who in turn discarded the same, and it exploded, inflicting these grievous injuries on him. [3]

The accident occurred in 1946. Up to date Mr. White has suffered some six or eight operations on his feet. There were fractures of the leg. A lot of shrapnel was embedded in both feet, and most unfortunately, this condition has remained and has continued to bother him at the present time. He is now suffering from trophic ulceration, nerve injuries as a result of this accident.

That, in brief, I think, your Honor, is the plaintiff's case. Of course, we will also show, I believe, in addition to the contractual——

The Court: What, if any, events, preceded his

entry onto the strafing range? Any conversation?

Mr. Bloom: Yes, there will be evidence, if your Honor please, about how he was permitted to go out on the range, and what, if anything, was told to him, and what the government did or did not do to render this area safe.

The Court: All right.

Mr. Scholz: Would your Honor like to have a statement from me?

The Court: Yes.

Mr. Scholz: If your Honor please, the position of the Government in this case is threefold: First of all, that there is no cause of action stated by the complaint; secondly, the plaintiff himself was negligent; and thirdly, that the plaintiff accepted appreciative risks and hence can not recover. [4]

This accident happened at Camp Beale, near Marysville. I think your Honor probably is familiar with the general location. It is a government reservation consisting in part of land owned in fee by the Government and part leased. We have several ranges up there for small arms, large caliber and a strafing range mentioned by Mr. Bloom. That was all grazing land, and it was leased by the Real Estate Department of the Engineers of the United States Army under a certain clause which I do not think is pertinent here, but by which the Army or the Government was safeguarded in the event they returned it to the lessors. The contract was entered into with the Mars Metal Company, and as I understand—I am not definitely sure, but I think that Mr. White was employed by them on a con-



tingent basis of some sort. That is not particularly material. However, he was with the Mars Metal Company and he went up there to the range and he met Captain Jones, who sits at my right here, who at that time was the post operating officer and also the post range officer. Captain White discussed the situation with him and informed him——

The Court: Captain White?

Mr. Scholz: I mean Captain Jones. I beg your Honor's pardon. Captain Jones discussed the situation with him and told him of the fact there was a firing range, which he knew because that was the contract itself, and that there were duds there. [5]

The Court: And that there were duds there?

Mr. Scholz: And that there were duds there, and also Mr. White said he was familiar with demolitions, because he was in the Seabees on Saipan. I did not meet Mr. White there, but I happened to be there, too. Therefore, in the first place, your Honor, the Government was under no obligation there. In the second place, because he knew what he was going into.

In the second place, we will show that he picked up this shell, or it was handed to him, rather, by unauthorized employees of White, and White threw it down and it exploded, and White, being familiar with demolitions—at least that was his statement—being with the Seabees in Saipan, had full knowledge of it, and therefore the Government is not liable in this case.

Mr. Bloom: Mr. White, please.

## JOHN PHILLIP WHITE

the plaintiff herein, was called as a witness on his own behalf, and being first duly sworn, testified as follows:

The Clerk: Please state your name, your address and your occupation to the Court.

A. John Phillip White, 4 Third Street, Sausalito, California.

## Direct Examination

By Mr. Bloom:

Q. Mr. White, you are the plaintiff in this matter, are you not?      A. Yes. [6]

Q. In the year 1946, in the month of November, and for several months prior to that time, you were employed by the Mars Metal Company, were you not?      A. I was.

Q. What kind of a concern was that organization?

A. The Mars Metal Company was and is a concern for the collection, the purchase of scrap metal, and the processing of them.

Q. What was your function or position with that concern?

A. I was a salesman of the finished products of the Smelter Division. I was also a buyer for scrap metals from industries and an investigator of various lots of material offered by the Government.

Q. I show you a War Department invitation bid and acceptance on War Department contract form No. 26 dated November 28, 1946, which bears the signature "John Phillip White, Representative of

(Testimony of John Phillip White.)

Mars Metal Company, Bidder," and I will ask you if that is your signature?      A. It is.

Q. Did you, on behalf of the Mars Metal Company, at or around that time submit this bid and negotiate this contract?

A. I submitted the bid and I did the investigation of the camp before the bid was put in. There was no negotiation.

Mr. Bloom: If your Honor please, I offer this in evidence as Plaintiff's first exhibit.

The Court: It may be marked. [7]

(The contract referred to was thereupon received in evidence and marked Plaintiff's Exhibit No. 1.)

Q. (By Mr. Bloom): In connection with this contract, Mr. White, when did you first contact the Army or any officer thereof concerning this bid?

A. Some time in September of 1946 I went to the head office of the Salvage Department at the Presidio here.

Q. Whom did you see there and what did you do?

Mr. Scholz: If your Honor please, I will object to that on the ground it is hearsay. It would not be binding on the Government.

Mr. Bloom: It is only preliminary, if your Honor please.

The Court: You may proceed.

The Witness: I do not recall the name of the officer to whom I spoke at the Presidio. However,

(Testimony of John Phillip White.)

I asked him which of the camps had had contracts let for the recovery of bullet metals.

Q. (By Mr. Bloom): And he told you——

A. He told me some that had and some that had not been, and he told me that Camp Beale was the largest of those that had not been let.

Q. What thereafter occurred in connection with this contract?

A. I asked the Presidio office if it was necessary to make any arrangement for me to go to Camp Beale and inspect it. They said no, it wasn't necessary to make any particular [8] arrangements, but they did not know whether that camp had anything that was recoverable or not, that the individual camp salvage officer had not submitted any proposition to them to let such a contract; that if I wished to go up and take a look, and if I thought it was worthwhile that bids would probably be put out.

Q. Did you go up there?           A. I did.

Q. When?

A. Some time in September of 1946.

Q. When you went up there, whom did you see?

A. I saw either the commanding officer or the executive officer.

Q. You asked for either the commanding officer or the executive officer?

A. I asked for the commanding officer, but I believe that the commanding officer was not in, and so I spoke to the executive officer.

Q. What was the nature of that conversation?

(Testimony of John Phillip White.)

A. I was told that if I wanted to inspect the ranges, that that was quite all right, that I would be provided with a guide for that purpose, that it had not come to his attention as to whether bids should be let or not for the reclamation of metals there.

Q. Was that all that was said by the executive officer or the officer you referred to? [9]

A. Yes.

Q. Did he call in someone to show you around the ranges?

A. He either called them in or told his aide to have the man call in, and I was supplied with a guide.

Q. And who was that guide, if you recall?

A. A sergeant named Hodges.

Q. Do you know what his position was?

A. I was told that he had been the range sergeant and was still the range sergeant.

Q. Will you tell us what happened with Sgt. Hodges?

A. Sgt. Hodges said—well, “What ranges do you want to see?” I told him I thought I would be primarily interested in the rifle ranges. However, I was not familiar with the whole operation of the camp. I didn’t know everything that had been shot there, and so whatever he could do to help me in addition to looking at the rifle ranges would be appreciated.

Mr. Scholz: If your Honor please, I do not want to interrupt the witness, but may it be stipu-

(Testimony of John Phillip White.)

lated my objection goes to all this line of questions?

The Court: Yes. Overruled.

Q. (By Mr. Bloom): Continue.

A. So we made an inspection of certain ranges there.

Q. Will you please tell us what ranges were inspected?

A. We started with the rifle ranges. Then we went to the machine gun ranges, to the pistol ranges. And then I asked [10] Sgt. Hodges if there had been any strafing done at Camp Beale. He said yes, and he showed me the strafing range.

Mr. Bloom: Counsel, I have a diagram on the board here of this area in question, and I am going to ask the witness, for purposes of convenience, to testify concerning the locale from this diagram. If there are any inaccuracies in it or anything that is not exactly the way it should be, of course I am open to correction. I think it is a fairly accurate portrayal of the general area.

Mr. Scholz: I have no objection. I am going to introduce an official map anyway.

Mr. Bloom: Fine.

Q. I show you an area here on this diagram which we call, marked with "Targets," and marked with "Target Finders," and I will ask you if you will show his Honor where the range is on this diagram?

A. The strafing range is that area between targets and target finders.

Q. Does it embrace all of this area generally?

(Testimony of John Phillip White.)

A. Generally, yes.

Q. And there is a gully that divides the strafing range?  
A. Yes, approximately in half.

Q. Now, you will note that this diagram has been drawn to an approximate scale of 200 feet to the inch, and I will show you a road marked off on the extreme south end of the diagram, and [11] I would like to ask you how you approached and got on this strafing range with Sgt. Hodges at the side you have testified?

A. On my first visit to the camp, we came by this road, this main road down at the bottom of the map, to a pass that was—ran parallel to the anti-tank ranges, and then ran in an irregular method in the direction of the strafing range.

Q. Is this the approximate approach, then that you made?  
A. Yes.

Q. Were you on foot or did you have some conveyance?

A. I was driven by the sergeant in a jeep.

Q. Can you tell us approximately what the distance is between these targets and these target finders?  
A. I would say about 600 feet.

Q. That was the area you were interested in?

A. Yes.

Q. Can you tell us approximately your best approximation of what the distance is between the south end of this strafing range and the road from which you made entry?

A. I believe it is approximately a mile.

Q. You talked about examining, I think, a rifle

(Testimony of John Phillip White.)

range, a pistol range, or both, immediately prior to this?      A. Yes.

Q. Where were those ranges located? Do they appear on this diagram?

A. No. This area is, I believe, some six miles from the main [12] portion of the camp. The rifle ranges are relatively close to the main portion of the camp, and the machine gun and pistol ranges are closer to the rifle ranges than they are to this.

Q. I see. Then I take it the only other ranges that are anywhere near this strafing range are what are denominated these anti-tank ranges 9 and 10 down below at the extreme south end of the diagram, is that correct?

A. I beg your pardon?

Q. I say the only other ranges adjacent or near the strafing range are these two anti-tank ranges?

A. That is all that I remember.

Q. When you got on the strafing range with Sgt. Hodges, did you have any further conversation with him there?      A. You mean on my first visit?

Q. Yes.

A. Yes, we had quite a bit of conversation there.

Q. Did you have any conversation respecting the range? I am now confining myself, of course, to that subject. If so, will you tell us what it was?

A. He told me that this had been used—he told me how long it had been used, how long since it had been used.

Q. What did he say in that regard?

A. As I remember it, the strafing range had



(Testimony of John Phillip White.)

been in use for approximately two years, but it had been more than a year since it has been used at the time that I was there. [13]

Q. Any further conversation?

A. He told me that on that range up there there would be a number of anti-tank projectiles which were solid chunks of iron with a piece of gilding metal around them.

Q. Did you find any of those or did he show you any of those?

A. He was not able to find any on our first examination. He was not able to find any on the strafing range, but he told me he had a number of them at the range office, and he showed them to me at the range office as we left.

Q. I show you a decontaminated shell and I will ask you if you know approximately what kind or type of shell this is?

A. I would say it was a 37 millimeter.

Q. A 37 millimeter shell. When you refer to the solid anti-tank projectile, would you show us what part of the shell you have reference to?

A. The portion from this crimp to the end of it.

Q. Do I understand that the projectiles shown you by Sgt. Hodges consisted of solid pieces of iron? Is that your testimony?      A. Yes.

Q. No warhead or explosive—

Mr. Scholz: Maybe I misunderstand the testimony, but I thought he said Sgt. Hodges said he could not find any at that time.

Mr. Bloom: He said he took him back and

(Testimony of John Phillip White.)

showed him some [14] when he got off the range.

Q. These projectiles that he showed you consisted of solid iron pieces, is that correct?

A. Yes.

Q. Without any warhead or explosive matter in them? A. Yes.

Q. Was that the only type of shell that Sgt. Hodges showed you?

A. No. At the range office he also showed me some bits of a small incendiary bomb that they had used at one time.

Q. Was there any conversation about duds or explosives on that strafing range? A. No.

Q. Was there any warning of any kind given to you by Sgt. Hodges with respect to the possibility of duds or explosives on that firing range?

A. Yes.

Q. What was that conversation and when was it?

A. There was a marked projectile which was halfway embedded in the earth. There was a stick with a red rag on it, and Sgt. Hodges told me that it was there. It was a trick, and there was no reason for it to be there that he knew of, but it was there and to stay a safe distance from it.

Q. Will you please go to the diagram and draw an X at the place where this dud was located and called X?

A. I would say it was there (indicating). [15]

Q. Does that correctly represent the approximate location? A. Yes.

(Testimony of John Phillip White.)

Q. Did Sgt. Hodges point out any other duds or any other explosives to you on that range?

A. He didn't point out any others, and I asked him about the possibility of others and he explained to me that a certain procedure had been used where high explosives had been shot which was that whenever high explosives had been shot and the observers did not see it explode, that firing in that direction was stopped, a crew was sent out to locate it, and the projectile, if it were a high explosive, was either decontaminated or immediately marked for decontamination later.

Q. Do you know why Sgt. Hodges referred to this marked dud as a freak?

A. Only inferentially.

Q. Pardon?

A. I say I know it only inferentially.

Q. Did he say why he characterized it a freak?

A. Because that was not an area in which such projectiles would normally fall.

Q. Have you told us everything that was said at this first conversation about any explosives or possible explosives on that strafing range?

A. I think so.

Q. After you left that range with Sgt. Hodges, did you have any [16] conversations with any Army personnel on that occasion?

A. On my first visit there?

Q. Yes. A. I don't believe so.

Q. When was the next visit to Camp Beale by you?

(Testimony of John Phillip White.)

A. I think as a result of that visit—in any event, shortly after my visit, bids were let, proposals were sent. Upon the receipt of the proposal I had made enough of a preliminary examination on my first visit there to know that I wanted to submit a bid. I went up again with the idea of gathering additional information upon which I might base the bid which we would submit.

Q. When was that?

A. That was some time in October.

Q. Whom did you see, if anybody, or talk to?

A. Once again I went to the commanding officer's office and once again I was given Sgt. Hodges to give me such information as I needed.

Q. Did you have any conversation with the executive or commanding officer?

A. I don't think so on that occasion.

Q. Did you examine any ranges with Sgt. Hodges on that occasion?

A. Yes, we examined the same ranges we had examined before. He also took me to an area in which street fighting had been [17] taught and a mock town some miles beyond the strafing range. I was limited in time, but I did get additional information.

Q. Did you have any conversation on this occasion with Sgt. Hodges respecting the condition of the ranges, and in particular the strafing range?

A. I had one specific conversation with the sergeant at that time. I had driven up to take a look at them, and I had my then fiancee with me, and

(Testimony of John Phillip White.)

Sgt. Hodges said it was all right for her to go around in the jeep with us. And so we went around. Having already decided that there was sufficient to justify working it, at the same time I wanted to get a better estimate of how much it would cost to do this range job; so my fiancée was in the jeep when we got onto the strafing range. We got out and I was estimating how many cartridges per square yard, and my fiancée continued to sit in the jeep. I asked her why, and she said it wasn't safe. I considered it safe on the basis of previous conversations with the sergeant, but in order that she might hear it directly from the man who was supposed to be an authority, I asked him if it was safe for her to get out and walk around. The sergeant said it was. And she got out of the jeep and walked around herself.

Q. Now, the area that you walked around with your fiancée—was that the strafing range proper and near the targets and the target finders on this diagram?

A. Yes, with the precaution of staying at least 25 feet away [18] from that marked "dud."

Q. Was there any further conversation pertaining to this subject with Sgt. Hodges on this occasion?

A. I don't believe so.

Q. Will you please tell us if you had any conversation with any other officer, executive officer, commanding officer or person of like authority on that occasion at Camp Beale, or was that the end of your conversations?

(Testimony of John Phillip White.)

A. I believe I went back and thanked the executive officer for his courtesy in providing me with Sgt. Hodges, but I had no extended conversation with anyone.

Q. What was the next time you went back to Camp Beale?

A. The day that the bids were to be opened and the awards made.

Q. Do you remember what date that was?

A. I believe it was November 18th at 11:00 o'clock.

Q. Did you have any conversation with Captain Petrie, the contracting officer, or any other person in authority on this subject at that time?

A. Yes, I had a conversation with Captain Petrie. I told him—well, ours was the only bid submitted. Therefore, Captain Petrie said, “Well, you got the job.”

Q. Captain Petrie was the purchasing and contracting officer?      A. Yes.

Q. He is the same Captain Petrie who appears on Plaintiff's [19] Exhibit 1, is that true?

A. You mean he signed the——

Q. He signed this contract?      A. Yes.

Q. What was that conversation with Captain Petrie?

A. That I was going to start work on the strafing range immediately, and while the strafing range was going to be worked, that I was going to make further investigations as to the feasibility of working other ranges.

(Testimony of John Phillip White.)

Q. That is the substance of your conversation?

A. Yes.

Q. Did he give you any warning on any danger in that strafing range? A. No.

Q. Did he talk about duds or the like?

A. On a strafing range?

Q. Yes. A. No.

Q. Or on any other range? A. No.

Q. What happened after the Mars Metal Company's bid was accepted?

A. I was there. I wanted to get to work immediately. It was either 11:00 o'clock or 1:00 o'clock. I am not sure. And I wanted to get to work immediately. It was necessary for me to [20] get sacks for the gathering of these materials. I also had to get some men to do the work, make all the necessary arrangements for transportation, weighing it in with the salvage officer in accordance with the contract, and all of those details. I also had to confer with an officer because the contract calls for the gathering, the operation of this in conformance with any firing schedules.

Q. Did you confer with an officer in respect to that?

A. Yes, I conferred with an officer in respect to that, and also along the lines that I had spoken to Captain Petrie, that I wanted to investigate the feasibility of other ranges. I had not at any time with Sgt. Hodges gone to the actual artillery ranges, and it was my impression that the artillery projectiles were mainly cast iron, and I was not in-

(Testimony of John Phillip White.)

terested in iron, but then I think maybe I don't know everything, so I went to talk to somebody about the possibility of brass on the artillery ranges.

Q. Whom did you talk to?

A. I am not sure what his rank was. I believe he was a captain whom I was directed to as the post range officer, because basically I wanted to have my operations in conformance with any firing schedules they had.

Q. Do you recall now whether that officer was Captain Jones or not?

A. The name is familiar. I think it was.

Q. This gentleman who sits at the counsel table—do you [21] recognize him as the officer you spoke to?

A. I would not swear that he was, but I wouldn't swear that he wasn't either.

Q. What was your conversation with this officer?

A. That having been awarded the contract, that I intended to start work on it, and was there going to be any firing which was going to mean that I would have to suspend operations or that I could only work certain hours.

I also asked about artillery projectiles and such. The gentleman warned me that artillery projectiles—that artillery projectiles are dangerous things to handle, that they are mostly cast iron, and so in the course of the conversation I decided I just don't want to handle any artillery.

Q. Did you so tell him?

A. Yes, I told him that I had every desire to



(Testimony of John Phillip White.)

stay away from everything that was dangerous.

Q. Did you tell him you were going to start operations on the strafing range? A. I did.

Q. Was anything said by this officer in connection with a condition or any danger on the strafing range?

A. I believe that the captain informed me of the marked dud that was on the strafing range with a standard admonition to be careful about the marked dud.

Q. Was anything said about any other explosives or potential [22] danger?

A. On the strafing range?

Q. Yes. A. No.

Q. What did you do thereafter?

A. I went to town and bought tow sacks and I spoke to the executive officer, telling him I was going to have to employ people, and was there any objections to my hiring soldiers on their off time. And the executive officer said no. He could see no objections to the soldiers working on it offtime.

Q. (By Mr. Scholz): Will you tell us who were present, the date and the time of this conversation?

A. The date was the day of the contract award. I don't believe there was anybody else present at the time.

Q. You do not remember who was present?

A. I said I don't believe there was anyone present. The sergeant may have been present with me at the time, but I don't believe there was anyone present there.

(Testimony of John Phillip White.)

Q. And who was this with?

A. The executive officer.

Q. What was his name? A. I don't recall.

Q. (By Mr. Bloom): So what did you do in response to that conversation?

A. I got some MPs who were going to be off. They said yes, [23] they would like to pick up the cartridges.

Q. How many of them did you obtain?

A. I believe I had a total of five.

Q. The first thing, how many did you have?

A. I think there were three the first day.

Q. Was Sgt. Hodges amongst those?

A. Sgt. Hodges had other duties the first day.

Q. Did you go out on the strafing range that day?

A. I believe we did, although we may not have started until the next morning. I am not positive.

Q. Whenever you started, either that day or the next, what time of day did you start to work?

A. About 8:30.

Q. How many men did you have with you?

A. Three.

Q. And they were army men, were they?

A. Yes.

Q. What area did you go out to?

A. Just to the strafing range.

Q. And how did you work that area that day?

A. We worked until around 12:00 o'clock, and then knocked off an hour, and then worked until around 4:00 o'clock.

(Testimony of John Phillip White.)

Q. What was your general procedure in working that range with these army men?

A. We had tow sacks and everybody had a tow sack, and he put [24] a tow sack down in his area and just worked around the tow sack until the tow sack was filled up and then he moved further up the hill, put another tow sack down, and started filling it up.

Q. What were you collecting or picking up?

A. 50 caliber cartridges.

Mr. Scholz: I will stipulate that the larger is a 50 caliber shell and the smaller a 30 caliber shell.

Mr. Bloom: Thank you, counsel. I didn't know what they were.

Mr. Scholz: I fired them.

Q. (By Mr. Bloom): I take it you were picking up the casing, the nonferrous casing that I now show you. A. Yes.

Q. Counsel says this is a 50 caliber casing. Were you picking up casings like that?

A. Mostly, although there were some smaller caliber empty cartridges there.

Q. Resembling perhaps this? A. Yes.

Mr. Bloom: If there is no objection, I would like to have these marked as Plaintiff's Exhibits next in order, 2 and 3.

The Court: So ordered. [25]

(The casings referred to were thereupon received in evidence and marked, respectively, Plaintiff's Exhibits Nos. 2 and 3.)

(Testimony of John Phillip White.)

Mr. Bloom: Also, if there be no objection, I would like to offer this shell as plaintiff's exhibit next in order, No. 4.

The Court: So ordered.

(The shell referred to was thereupon received in evidence and marked Plaintiff's Exhibit No. 4.)

The Court: When you say "this shell," counsel, you might identify it. 35 millimeters?

Mr. Bloom: 37 millimeter decontaminated shell.

Q. In other words, as I understand, the only thing you were collecting were brass cartridges, is that right?

A. Not completely. That was 99 per cent of what I was collecting.

Q. What was the 1 per cent?

A. In the strafing there is a certain amount—most of the lead went into the ground. However, there were areas where the range had accumulated little piles of the lead bullets themselves.

Q. But you were not picking up any ferrous materials, is that correct?

A. No, I was not picking up any ferrous material. I didn't want any.

Q. And had you so instructed your helpers? [26]

A. Yes.

Q. Did you tell them you were not interested specifically in any of these anti-tank shells—

Mr. Scholz: I object to that on the ground it is hearsay and not binding on the defendant.

(Testimony of John Phillip White.)

The Court: Overruled.

Q. (By Mr. Bloom): What did you tell them with respect to these solid anti-tank projectiles, if anything?

A. I told them I didn't want them.

Mr. Scholz: Same objection.

The Court: Overruled.

A. That I wanted the tow sacks full of brass cartridges.

Q. (By Mr. Bloom): Were you all working close together or did each man have a particular area that you assigned to him?

A. I asked each of the men to line himself up between the target finder and the target and work up the hill.

Q. How far apart were your men?

A. When they were working, they were approximately 200 feet apart.

Q. Where were you in reference to them? Were you also engaged in picking up the material?

A. Yes, and I was sort of following up and cleaning up those that they missed. The cartridges were quite thick. They were missing a number of them, and I was following behind to pick up those that they missed. [27]

Q. When your sacks were filled, what did you do?

A. Tied them with wire. We were going to wait until the truck got there, and then we would have enough sacks of cartridges to load them on a truck. We left the sacks of cartridges just where they were as they were filled.

(Testimony of John Phillip White.)

Q. And that procedure went on all day the first day?           A. Yes.

Q. Was Sgt. Hodges out there on the range at any time during that day?

A. He was there for a while either that day or the next day.

Q. And what was the reason for his coming on the range?

A. He was a friendly guy. He was interested in the operation.

Q. He saw the procedure that was being used, did he?           A. Yes.

Q. Did he have any comments about the procedure or any other comments in reference to this subject on that occasion?

A. Not only did he ask me if I had warned the people to stay away from that marked dud, but he commented on the fact that I had marked the dud better than it had originally been marked.

Q. Had you marked it better than it had been?

A. Yes. Originally there was a stake with a rag on it, and I didn't want any trouble, and so I put some rocks which were available at a radius of 20 to 25 feet and told the men, "Don't even go inside the radius."

Q. Was that the substance then of your conversation with Sgt. [28] Hodges?           A. Yes.

Q. The next day, the second day, did you again utilize the services of army personnel?

A. Yes.

(Testimony of John Phillip White.)

Q. How many men did you have on that occasion?

Mr. Scholz: What day was that?

Mr. Bloom: Well, it was the next day. It was either the 20th or the 21st.

The Witness: Well, I didn't have all the same people. I believe I had four people the next morning; some of those who had been with me the day before and some who were new because of the hours they were on duty.

Q. Was that the day that the accident occurred?

A. I believe the accident occurred the third day I was working.

Q. The second day, I take it, you went through the same collecting procedure?

A. Yes, I think it was the same collecting procedure. It was all the same. It was a simple job.

Q. Now, the third day did you again engage army personnel on their off hours?      A. Yes.

Q. How many?

A. I had three working that morning.

Q. Do you remember the names of those particular men and what [29] their ranks were?

A. I don't remember their ratings, but there was one named Lang. I don't recall the names of the others.

Q. There were three, one of whom was named Lang, is that correct?      A. Yes.

Q. What time of day did you go out to start collecting?      A. About 8:30.

Q. Once again, I take it that you were confining

(Testimony of John Phillip White.)

your activities to the strafing range depicted on this diagram, is that right?      A. Yes.

Q. Will you tell us how you got on the range on this third day?

A. The same way I always did. I came out the road marked "Wheatland Road," turned left, I then turned up the trail that runs parallel there to the anti-tank ranges, and over the wandering road.

Q. You drove with your truck, is that correct?

A. No, I didn't have a truck. I was collecting material. The truck was to come up. I drove in my own car.

Q. And then you had the army personnel in your own car, is that it?      A. Yes.

Q. Where did you stop the car? [30]

A. About 300 feet south of the target finders.

Q. Then you got out and walked on the range, did you?      A. Yes.

Q. What time of day approximately was this?

A. Around 8:30 or 9:00 o'clock.

Q. What time did this accident occur?

A. About 12:45, I believe.

Q. Had you knocked off for lunch yet or not?

A. Yes, we had knocked off for lunch and then we had come back.

Q. Where did you eat your lunch?

A. They had eaten in the messhall and I had gotten some candy or something of that nature in the Post Exchange.

Q. Then you went back with the same three men, did you, after lunch?      A. Yes.



(Testimony of John Phillip White.)

Q. What part of the strafing range did you commence work with your men?

A. I believe we were working the front end of it.

Q. The extreme west end?

A. I believe we were working on—in front of targets 2 and 3.

Q. By targets 2 and 3, I assume you mean the targets which I now mark 2 and 3 on this diagram, is that right?           A. Yes.

Q. And you were somewhere in this area between the targets and the target finders? [31]

A. Yes.

Q. Will you tell his Honor, please, what happened at the time or immediately preceding the accident?

A. The man Lang had not gone over to pick up a sack yet——

Q. I am sorry. Would you speak a little louder?

A. I said the man Lang had not picked up a sack yet. We were relatively close together. We were walking close together. And the sack which I had been filling before lunch, I was standing close to it, and Lang was a few feet away from me. He picked up something and said, "Do you want this?" And I see it in his hand, I think that is one of these solid chunks of iron which the sergeant told me would be found on the range. And I said, "No, I don't want it. It is only a small piece of gilding metal with a lot of iron on it and I am not in the iron business."

(Testimony of John Phillip White.)

Although I told him I didn't want it, and not to put any in the sacks, he was standing during the conversation fairly close, but started walking off. Nevertheless, he pitched it to me. I mean, it was a very short pitch. And so I was not greatly concerned about the matter. I attempted to catch it as you would attempt to catch anything that is pitched to you, but I did not hold onto it. It dropped, exploded, and the next thing I know I am down on the ground with both of my feet mussed up.

Q. How far would you say this explosive dropped from your [32] feet?      A. One foot.

Q. What was your position on the ground immediately after the explosion?

A. I was sitting down. I was not lying down. I was sitting down for some reason.

Q. What did you do?

A. Seeing that my feet were in a bad way, that the blood was gushing from one of them pretty bad, I took off a belt and made a tourniquet for it. I looked and saw Lang was holding his stomach. And so I called for the other men to go get the car and get Lang in the car. And I took off my shoes and the car was driven by the other man fairly close to us. It was driven close to Lang and while this man was getting Lang into the car, in order not to waste any more time, I walked on my knees and got up to the car myself. I was helped in. I was in the back. Lang was in the front, I believe—no, he put us both in the back. And so I told the man to take us to the hospital as fast as possible, which he did. At the hospital——

(Testimony of John Phillip White.)

Q. Did you have reference to the army hospital at Camp Beale?

A. Yes, the army hospital at Camp Beale. At the hospital a doctor comes out and he starts looking at me, and I told the doctor that I thought the other man was probably the worst because he was holding his stomach, and he said, "I will look at both of you." [33]

Then he tells the man to drive over to the other entrance, and as they are helping me out of the car, I became unconscious for a short time—I don't know how long—but I had no—

Q. Was that the first time that you became unconscious or lost consciousness?

A. I think I was unconscious for a second or two at the time of the explosion, but it all happened so fast—that was the first time—I was conscious all the time we were driving to the hospital.

Q. After you came to on the second occasion then what happened?

A. I was on a Gurney being wheeled down a hall in the hospital, and I was being asked questions; I told them—we had been collecting the bullets so fast that I expected to have the truck load that afternoon. So I asked someone to call Mars Metal Company and tell them, "Don't bother to get the truck up because it wouldn't be loaded." And then I gave my fiancee's address, where she might be reached. They got me in the operating room and they started giving me penicillin, sulfa and blood plasma. And then they gave me some gas. I passed

(Testimony of John Phillip White.)

out, and when I woke the next day I was in a hospital bed with a cast on my feet—on my legs.

Q. Did you sustain any fractures in this accident?      A. Yes.

Q. Do you know what fractures you sustained?

A. I had a fracture in the right leg just below the knee, and [34] then I had a number of fractures in both feet, but as to the names of the bones involved, I don't know.

Q. Do you know if you had fractures on the left foot or not?

The Court: The fractures and the nature thereof may be reflected in a medical report.

Mr. Bloom: Yes, your Honor. I will pass on.

Q. First, to get a little on what treatment you had, how long were you in the hospital at Camp Beale?      A. Five days, I believe.

Q. Will you tell us generally what the nature of the treatment was that was given to you during those five days?

A. During the first day they cut the nerves close at hand constantly. I was given penicillin every three hours and I was given some sulfa drugs orally every four hours.

Q. Did I understand you to say after you got out of surgery you found you had casts on both feet and legs?

A. Yes, I had casts up to the knees on both legs.

Q. How long did those casts remain?

A. They split the casts the next day because

(Testimony of John Phillip White.)

Captain Finski, the doctor, wanted to see how things were progressing.

Q. It was put back then?

A. But they were put back with adhesive tape after each inspection.

Q. How long was it until they were taken off?

A. Well, I don't know just how many days, but they were there [35] all the time I was at Camp Beale Hospital, and they remained on while—then I was transferred to Mary's Help Hospital here, and my legs were kept in the cast while I was in Mary's Help Hospital.

Q. Will you tell his honor, as far as you are able and as far as you know, what other injuries you sustained as a result of the explosion or that manifested themselves at that time?

A. Part of the bone in the great toe of the right foot, or the bone leading from the big toe, was knocked out. The captain, Finski, performed some sort of an operation so that it took care of it. However, the right toe is considerably shorter than the rest of the toes now. It is in my left foot—the fracture was right here in the right leg—then in the left foot there were wounds where shrapnel had passed right through the foot. One right back of the ankle. There was a great gash over the ankle. There were cuts across the top of my feet. And there was a space right over the arch where a piece of shrapnel passed immediately through the foot, directly through. A couple of the toes were sort of mangled, knocked out of alignment.

(Testimony of John Phillip White.)

Q. Do you know if Dr. Finski removed any foreign metals, foreign substances from your legs or feet?

Mr. Scholz: I think Dr. Finski would be the one to testify to that.

Mr. Bloom: That is true, but he was an army doctor, you [36] know. He is not available.

The Witness: Dr. Finski removed considerable shrapnel, and Dr. Finski was making a little joke about it. It was a shame I was not collecting iron because I had quite a bit of it there.

Q. How long were you at Camp Beale in the hospital?      A. Five days, I believe.

Q. Then what happened to you after that?

A. I was put in an ambulance and carried to Mary's Help Hospital here.

Q. And you were under the care of what doctor in San Francisco?      A. Dr. Larue Moore.

Q. How long were you in Mary's Help Hospital?

A. From November 27th to January 22nd.

Q. Will you tell us what treatment in general Dr. Moore or his associates administered to you?

A. They continued the penicillin and the sulfa for a certain period. I don't know. I would say five, six or seven days after I got here. And then they continued to inspect my feet every day. They removed additional shrapnel from the heel in one of my feet while I was there at Mary's Help. And they said I ought to be able to get along with only one shot of morphine a day to put me to sleep.

(Testimony of John Phillip White.)

Q. By the time you got out of the hospital had the cast been [37] removed?

A. Yes, the casts were removed while I was in Mary's Help.

Q. When you were discharged from Mary's Help were you using crutches? Were you able to get around?

A. I was using crutches.

Q. And you continued to use crutches for how long a period of time?

A. I don't recall how long, but I continued to use crutches. However, I used crutches until the doctor told me to start using a cane, and I have used crutches intermittently since then.

Q. Do you recall that in February of 1947, after you had gotten out of the hospital, that you went to the office of Dr. Moore for another operation?

A. Yes.

Q. Will you tell his honor what that operation consisted of?

A. Some of the shrapnel had worked its way between the bones leading to the toes, and they removed two fairly sizable pieces of shrapnel from between those bones.

Q. Did you use crutches or a cane or both thereafter?

A. Yes, I have used crutches and a cane intermittently ever since up to—I have used crutches as late as July of this year.

Q. If you will recall that in the month of September, 1947, you consulted Dr. John Niebauer at

(Testimony of John Phillip White.)

the Stanford University Hospital. [38] Do you recall the occasion for going to see him?

A. Yes. There had developed a condition on my left foot, and Dr. Moore and his assistants had said, "That has nothing whatever to do with the results of the accident." So I was no longer under the care of an insurance doctor, and I thought that it was a result of the accident. Dr. Niebauer, being an expert in such matters, I went to Dr. Niebauer to get his opinion on what the condition was.

Q. Did he treat you?

A. Well, this condition was an ulcerous condition on the foot, and Dr. Niebauer treated me to the extent that he removed all the ulcerated flesh. He excised it. He lanced it out.

Q. On what foot was this?

A. This was the left foot.

Q. Was it draining? A. Yes.

Q. Was this ulcerated condition localized in one spot or more than one spot?

A. It was localized in one spot, but the spot was growing rather large.

Q. What sensations did you have or symptoms from this condition at that time?

A. Well, all of this time the bottom of my foot has been insensitive to certain stimuli, that is, it is insensitive to heat and cold. It is insensitive to pin pricks. On the other [39] hand, it has been quite sensitive to certain other stimuli. I mean to hit the foot, it hurts. To prick it, I don't feel it.



(Testimony of John Phillip White.)

Q. Was that the condition you then complained of when you went to see Dr. Niebauer?

A. I know I went to see Dr. Niebauer and I asked him about this ulcerous condition, this stinking sore on the bottom of my foot. I wanted to know what it was. Was it a result of the accident or was it not a result of the accident? Was it something I was going to have to take care of or was it something the insurance company should take care of?

Q. He cut away, as I understand it, the flesh and debriated the injury, is that right?

A. He cut away the dead flesh and told me to get on crutches and stay on crutches. Don't put any weight on it. And he told me it was a result of the accident, the severance of the nerve, that without the nerve power that such conditions did arise.

Mr. Scholz: I will object on the ground that that is hearsay also.

The Court: Where is the doctor? Is he available?

Mr. Bloom: Dr. Niebauer is. However, Dr. Morrissey, who has taken over the treatment, will be in court, your Honor. I do not think there is any necessity to get Dr. Niebauer.

Q. You went on crutches, then, did you?

A. Yes. [40]

Q. How long did you continue on crutches?

A. I was on crutches until I went in the hospital in November of that year.

(Testimony of John Phillip White.)

Q. Did your condition improve or did it go back?

A. From the time I went to see Dr. Niebauer until the time I went to the hospital I would say there was a slight improvement in it. I was on crutches. I was not subjecting it to pressure.

Q. Was there still drainage from this ulcerated area?

A. Yes. Not as much, but there was still drainage.

Q. Is that the reason why you consulted with Dr. Morrissey?

A. Well, I wanted a correction of the condition.

Q. Yes. Well, you did in early November solicit the aid of Dr. Edmond Morrissey, is that correct?

A. That is right.

Q. What, if anything, did Dr. Morrissey then do for you?

A. Well, Dr. Morrissey says, "You got to have complete rest. You've got to get off the foot completely. You are going into the hospital." He sent me to the hospital on November 10th.

Q. What hospital?

A. To St. Mary's. And there he made regular inspections of the area, and I was completely off my feet. And he told me that I was scheduled for an operation, but he was not going to operate until that area had healed up, because he was not going to operate while there was an open sore in such proximity. [41] Eventually it did heal over due to—I think it was six weeks of bed rest, and Dr.

(Testimony of John Phillip White.)

Morrissey operated for the splicing of some nerve in back of the ankle.

Q. What happened after that?

A. A couple of weeks later—he put my foot in a cast at the time this happened, and then a couple of weeks later he opens up the wound to see if the nerves have done properly. He closes it up again, puts a cast on it, and I stayed in the hospital a while longer, and then I had a walking cast put on and I got out of the hospital again.

Q. When were you discharged again from the St. Mary's Hospital?

A. Around February 1st.

Q. Of what year?           A. 1949—1948.

Q. 1948 you mean?

A. 1948. That was from November, 1947, to February, 1948.

Q. How long did this walking cast remain on?

A. Oh, several weeks.

Q. After that did you use a cane or a crutch?

A. I used a cane when the walking cast was taken off. Of course, I used a cane while I was using the walking cast, too, while I was learning to use it.

Q. How long did that persist?

A. I would say I probably had to use the cane for a couple of [42] months.

Q. Then what happened to your condition after that?

A. After this operation by Dr. Morrissey, there was an improvement—not a great improvement, but

(Testimony of John Phillip White.)

there was some improvement in the sensation of the foot. There was also a diminution of the pain. It was not eliminated, but it was lessened. And then for seemingly no reason it begins to get worse again.

Q. That was about in the middle of 1948, was it not?

A. Yes, about the middle of July, maybe, of 1948.

The Court: Counsel, I think we probably have reached a convenient time when we might recess until 2:00 o'clock. It is now a quarter to 12:00. If agreeable to counsel, we will resume at 2:00 o'clock this afternoon.

(Thereupon an adjournment was taken to 2:00 o'clock p.m.) [43]

Afternoon Session, 2:00 P.M.

Mr. Bloom: With your Honor's permission, I would like to put on Dr. Morrissey as our next witness out of order.

The Court: Yes.

EDMUND J. MORRISSEY

called as a witness on behalf of the plaintiff, and being first duly sworn, testified as follows:

The Clerk: Please give your name.

A. Edmund J. Morrissey.

Mr. Bloom: In the interests of time, you will stipulate the doctor's qualifications?

(Testimony of Edmund J. Morrissey.)

Mr. Scholz: If your Honor please, I have known the witness for many years, and I will stipulate he is eminently qualified, and I will even go further and say he is one of the best qualified men in San Francisco.

Mr. Bloom: Thank you.

Direct Examination

By Mr. Bloom:

Q. Dr. Morrissey, John Phillip White, the plaintiff in this case, is a patient of yours, is he not?

A. Yes.

Q. You have treated him for some period of time commencing with what date?

A. October 23rd, 1947.

Q. And he has been to this time under your general care and [44] supervision, has he not?

A. Yes.

Q. Will you tell the Court, please, from your examination, your first examination of Mr. White, what injuries you found him to be suffering from.

A. The injuries were confined to the feet, especially to the left foot, and he had numerous healed scars, some of which were quite thickened, over the left ankle, on the left foot, and on the lateral side of the left foot he had an ulcerated area, and he had anesthesia, that is, loss of sensation, over the bottom of the left foot, with some limitation of movement of the left ankle joint.

Q. Doctor, in response to subpoena, Mary's Help

(Testimony of Edmund J. Morrissey.)

Hospital of San Francisco has brought into court certain X-rays of the lower extremities of Mr. White, and with the permission of counsel, I would like to have Dr. Morrissey take a look at those X-rays and explain them to the Court. These date back to 1946, Doctor.

A. This is the X-ray of the right foot and it shows a fracture of the metatarsal, the first metatarsal bone of the right foot with a few small fragments present, one at the base of the fourth toe and three very fine ones scattered about the site of the fracture.

Q. How many metallic bodies do you see in that X-ray altogether? [45]

A. Three pinpoint ones and one about the size of the head of a large pin.

Q. What type or kind of fracture is that termed?

A. It is a transverse, somewhat comminuted fracture, because the lines extend up into the head. It is really a transverse fracture. Here is another picture of the same fracture.

Q. Are any additional metallic bodies apparent in that X-ray?

A. No. That is the same thing. There is the left foot. There appear to be two—three metallic bodies present there.

Q. Where are they located?

A. One is between the fourth and fifth metatarsal and the other between the third and fourth,

(Testimony of Edmund J. Morrissey.)

and there was another one, a small one, over one of the tarsal bones.

That is the right foot again.

This shows the right leg, the lower third, and shows four metallic foreign bodies, one of which measures approximately one centimeter by a half a centimeter, and the other is merely a pinpoint. They lie on the lateral, interior surface of the right leg at the junction of the middle and lower third. Here is one of the left heel, and shows two fair-sized ones measuring about a centimeter in diameter on the under surface of the heel of the left foot.

Q. Did I understand you to say, Doctor, that there was fracture apparent in those last X-rays?

A. No, there was a fracture apparent in the first X-rays [46] brought up in the right foot.

Q. According to the medical reports from Camp Beale, or, rather, from Dr. Moore upon his return to San Francisco, there was a fracture of the fibula, near the head of the fibula. Is that apparent in those X-rays?

A. That is probably the film I skipped over. Oh, you might say possibly there was a fracture there. It doesn't amount to a thing.

Q. There was an operation on that at Camp Beale and the report that I have here states that there was a fracture of the head and neck of the right fibula.

Mr. Scholz: Are you referring now to a report of Camp Beale?

(Testimony of Edmund J. Morrissey.)

Mr. Bloom: No, this is of Dr. Moore.

The Witness: Well, if it is, it doesn't amount to anything.

Q. (By Mr. Bloom): It isn't anything too apparent?

A. You see a few lines in there, but it is nothing to be worried about. There is no displacement. They are in good position.

Q. The reports say it was in good alignment and healed in proper course.

The Court: Was there any surgery of consequence?

The Witness: Yes, the surgery is apparent on the plaintiff. The surgery was not for the fracture.

Mr. Bloom: Well, there was some kind of operative [47] procedure at Camp Beale on account of that fracture, I believe.

The Court: I will accept the report. There may have been shell fragments there.

The Witness: I think that is probably what it was.

The Court: Possibly shell fragments removed.

Mr. Bloom: No, there was an actual fracture, if your Honor please, at the head of the fibula.

The Witness: There was what?

Mr. Bloom: A fracture at the head of the fibula.

The Court: That is conceded.

The Witness: We are talking about what the operation was for.

Mr. Bloom: I beg your pardon. I now offer the



(Testimony of Edmund J. Morrissey.)

X-rays as plaintiff's consolidated exhibit next in order.

The Court: So ordered.

(The X-rays referred to were thereupon received in evidence and marked Plaintiff's Exhibit No. 5.)

Mr. Bloom: We might as well finish with these X-rays.

Q. These are St. Mary's Hospital X-rays. These X-rays, Doctor, were they taken at your direction?

A. Yes.

Q. Would you describe what, if anything, they indicate?

A. They are X-rays of the left foot. They do not indicate any definite pathology. The reason we took them was to be sure there was an infection in the bone because of the perforating [48] ulcer on the bottom of his foot.

Q. Are any metallic bodies shown in those X-rays?

A. Not in these. Yes, there is one. It is up under one of these tarsal bones.

Q. What date do those X-rays bear, Doctor?

A. November 14, 1949.

Mr. Bloom: I now offer these two X-rays as plaintiff's exhibit next in order.

The Court: They may be marked.

Q. (By Mr. Bloom): And now to conclude this phase of the case, I show you two more exhibits of Mr. White taken at the St. Francis Hospital, and

(Testimony of Edmund J. Morrissey.)

I will ask you if these were taken at your direction and supervision.       A. Yes.

Q. What pathology do they show?

A. On the light I have here they do not show any pathology. There is still that small foreign body present, and another one in the lateral view is shown underneath the heel. By that I meant another foreign body.

Mr. Bloom: We offer this in evidence as plaintiff's next exhibit, your Honor.

The Court: So ordered.

(The X-ray referred to was thereupon received in evidence and marked Plaintiff's Exhibit No. 7.)

Q. (By Mr. Bloom): I have asked you, Doctor, to bring with [49] you such records as you have made of this patient for the purpose of refreshing your recollection, if necessary, and I am going to ask you when the patient again came under your care or supervision.

A. Well, he was seen by me, as I stated, in October, 1947, and at that time I recommended that the nerve on the lateral side of the foot be repaired because of this trophic ulcer, hoping that if we brought sensation back to the lateral surface of his feet, that might improve the condition.

Q. Would you explain, if you please, to the Court the cause of trophic ulceration of this type?

A. That is when you have an injury to the nerve and the patient develops a small ulcerated

(Testimony of Edmund J. Morrissey.)

area in the bottom of his foot, and he does not realize what they are, and he keeps walking on it, and it is not painful. And it keeps getting deeper and deeper. That is usually associated with lack of proper nerve supply.

Q. Did you make various objective tests of the condition of that foot at that time?

A. Yes, I did.

Q. What tests did you make, Doctor?

A. I examined the sensation of the foot and went over his reflexes, went over his muscle power.

Q. In examining the sensations in the foot, would you please explain what type of tests you make?

A. Well, the sole of the foot, the only thing you can use is [50] painful stimuli, because sometimes it is so thick they can't apprehend the cotton touch, and he had lost the sensation over the sole of his foot.

Q. Were there any other objective symptoms that you determined at that time?

A. He had these healed wounds on his leg and foot, and I couldn't get pulsations in the posterior tibial artery.

Q. Did you observe his right great toe was shortened?

A. I have been talking about the left foot.

Q. Yes, I understand.

A. Yes, I observed the right.

Q. Is that condition permanent, in your opinion?

A. Yes.

(Testimony of Edmund J. Morrissey.)

Q. And that is due to the removal of bony substance from that metatarsal?

A. It is due to shortening.

Q. (By Mr. Scholz): Are you speaking now of right or left? A. The right foot.

Mr. Bloom: The right.

The Witness: It is due to shortening of the metatarsal as a result of the fracture.

Q. (By Mr. Bloom): All the injuries which you have testified to so far as referable, are they not, to an explosion or might be referable to an explosion and the dispersal of shrapnel into the lower extremities? [51] A. Yes.

Q. In your opinion, are all the symptoms the result of that initial accident? A. Yes.

Q. With respect to this trophic ulceration on the left foot, would you please state what treatment you prescribed or administered?

A. Well, the main thing was to get this healed. We repaired the nerve and there has been a return of sensation, although it is not what you would term normal sensation over the foot, but there has been a return of sensation. But the ulcer has broken down on numerous occasions, and on those occasions we put him in the hospital and put him at absolute rest.

Q. You talk about the nerve repair that was made. Will you describe briefly the type of operation and procedure used?

A. All you do is to cut down that exposed nerve,

(Testimony of Edmund J. Morrissey.)

and where it has been severed, you section it back until you reach good nerve tissue on both ends, both the proximal and distal ends, and then bring them together with fine sutures.

Q. Do you recall how long the patient was in the hospital on account of this initial operation?

A. I think I might have it in my notes. It was about the first part of January that he entered the hospital.

Q. Of what year was that, Doctor.

A. 1948, and he was discharged from the hospital on February [52] 2nd, 1948.

Q. Thereafter did you treat Mr. White or operate on his foot?

A. While he was in the hospital, in order to bring those nerves together, they were under such marked tension that after ten days we opened the wound again and exposed it to see that the ends had not pulled apart, and we found the ends to be together, and closed the wound up again. The only other time we operated on him was when we removed a small foreign body from the interior or upper surface of the fourth toe, the right foot.

Q. When was that approximately?

A. That was done on April 27, 1949.

Q. And have you treated Mr. White subsequently to that time?

A. Yes, he has been coming into the office regularly and he has been in the hospital on several occasions.

Q. May I ask why you instructed him to enter

(Testimony of Edmund J. Morrissey.)

the hospital? You instructed him to enter the hospital, did you not?           A. Yes.

Q. Why did you prescribe that treatment?

A. An attempt to get the ulcer healed up because it kept breaking down. He would stay off his foot for a while, it would heal up, and then he would go around on crutches, be fairly well for a time and then begin to walk on it, and then it usually broke down and he would come into the office and it would be ulcerated and infected, and we would put him in the hospital and clean it up. [53]

Q. Has this situation persisted to date?

A. I believe it has healed at the present time, but you can't tell when it will break down again.

Q. Is it a fair statement that injuries of this type, where there are nerve involvements, that there is a likelihood or probability that trophic ulceration will develop in the future?

A. I don't think any more will develop, but I think this one will probably persist and continue to break down indefinitely.

Q. How about these various metallic bodies or pieces in both the feet? Does this patient show a tolerance for this type of thing or has he indicated trouble is likely to develop?

A. I think he has a tolerance for them. There is always a possibility, when you have a foreign body any place, that infection might start. But the only one that gave him any trouble was that one on top of the fourth toe of the right foot, which we re-

(Testimony of Edmund J. Morrissey.)

moved. The others apparently up to the present time have not caused any trouble.

Q. Would your opinion in that respect change if you knew that the doctors who had treated him before your treatment were compelled to remove metallic bodies on several occasions because——

Mr. Scholz: I object to that, on the ground it is cross-examining his own client.

The Court: Sustained.

Mr. Bloom: Very well.

Q. As of the present time, Dr. Morrissey, could you tell us [54] what complaints the patient made to you of his present condition?

Mr. Scholz: As of now?

Mr. Bloom: Yes.

The Witness: You mean the last time I saw him at the office?

Mr. Bloom: Yes.

A. He complained of some weakness of the right foot. He complained of weakness of the left foot. He complained of some sensory changes over the bottom of the left foot and some limitation of movement at the left ankle.

Q. In respect to limitation of movement, Doctor, at the present time what have you found in respect to any possible limitation?

A. It is not marked. I do not think that in itself causes any marked disability.

Q. Is there any limitation that you could ascertain?

A. In what?

Q. Any limitation of movement?

(Testimony of Edmund J. Morrissey.)

A. Yes, there is.

Q. Where is such limitation?

A. Slight limitation of dorsal flexion of the left foot. Dorsal flexion—that means bringing it up.

Q. Would that impair or affect one's ability to run, climb or the like? [55]

A. It might interfere with his running, but I do not think it would interfere with his climbing.

Q. From your diagnosis of the patient's present condition, would you say that he would suffer in either extremity or both from prolonged physical exercise or lengthy walking?

A. Yes, I feel that there would be a tendency for the ulcerated area on the bottom of the left foot to break down at any time.

Q. Would the shortening of the right toe affect his ability to withstand severe strain or prolonged exercise?

A. It would result in some weakness of that foot, yes.

Q. I think I interrupted you to this extent: Would you please tell us then what symptoms you yourself have diagnosed or observed concerning this patient at the present time?

A. I think I have answered that.

Q. You think that your answers are complete on that?

A. Yes. He has a permanent disability here. There is no question about it. The man has a bad left foot as a result of this ulcerated area that keeps breaking down, and this may continue to break



(Testimony of Edmund J. Morrissey.)

down over a long period of time, and I think he has a permanent disability as a result of that.

Q. And the same applies to permanence concerning that right toe, is that correct?

A. Which would result in some weakness of the right foot.

Q. That, in your opinion, is permanent in character? [56] A. Yes.

Q. Now, if he has further breaking down of this ulcerated area, what treatment will be necessary?

A. Just continuous observation, and when it breaks down, put him at rest until it heals up, hoping that it will heal up. In these cases the question always comes up as to whether it is worthwhile doing a graft on the bottom of the foot, but a graft does not work on any surface like that where you have to put on a lot of pressure. If it was some area where there was no pressure applied, you just dissect your ulcer out and put a graft over it, but it would not do any good on the bottom of his foot here.

Q. Have you recommended to this patient that at the present time he try to avoid undue pressure or strain on that left foot?

A. I have told him that ever since I have seen him.

Q. And that is your recommendation for the future? A. Yes.

Q. The operation which you performed, Doctor, was to the sural nerve, was it not? A. Yes.

Q. Will you please tell us what that nerve is?

(Testimony of Edmund J. Morrissey.)

A. It is just one of those sensory nerves to the foot. It supplies the lateral surface of the foot and passes around in back of the ankle, and all I did was dissect the scar tissue away from it and freshen up the ends of the nerve and suture [57] them.

Q. I think in your report there shows evidence of injury to what is termed the tibial nerve.

A. That is right.

Q. What evidence did you have of such injury?

A. The lack of sensation over the medial surface of the foot, the bottom of the foot.

Q. But you have made no repair or attempted any repair of that nerve?

A. No, because he seemed to be getting some sensation back there.

Q. But there is a possibility that that might be recommended or attempted?

A. I don't think so.

Mr. Bloom: Counsel, I would like to put in evidence these medical reports.

Mr. Scholz: You mean of Dr. Moore?

Mr. Bloom: Yes, and also of Dr. Morrissey's with the exception of one or two. I provided you with copies of those.

Mr. Scholz: Will you let me put in my affidavits of my witnesses?

Mr. Bloom: I think that is an unfair bargain.

Mr. Scholz: I don't think so.

Mr. Bloom: That is a pretty sweeping request. I do not know what witnesses or affidavits you have reference to. Do [58] you object to these reports going in?

(Testimony of Edmund J. Morrissey.)

Mr. Scholz: My reports are just the same as yours, and if you are going to object to mine, I will object to yours. If you will go along with me and let me put my reports in, I will have no objection to your putting your reports in.

Mr. Bloom: I understood that prior to trial——

Mr. Scholz: I said I knew Dr. Morrissey very well, and whatever he wants to testify to—if you want to put his record in, that is perfectly all right with me. I know his statement on the stand would be just exactly as he thought. Isn't that what I told you?

Mr. Bloom: That is correct, but you also, as I understood it, said you would have no objection to any medical reports going in.

Mr. Scholz: Oh, hospital reports. No. But if you put in any doctor's statements, I would like to cross-examine unless you stipulate that I may put in my reports. Do you want to have yours in and object to mine?

Mr. Bloom: Do you have any objection to Dr. Morrissey's reports going in?

Mr. Scholz: He has already testified on all that, hasn't he? He is on the stand and that would be hearsay.

The Court: Do you desire additional matter in the report other than the testimony of the doctors?

Mr. Bloom: Yes, I think they are a little more complete, [59] but I did not want to take up the time of the Court. That is all.

Mr. Scholz: Why not ask Dr. Morrissey?

(Testimony of Edmund J. Morrissey.)

The Court: What specifically do you have in mind? You might read the statement and it may be stipulated to.

Mr. Bloom: Yes. For example, on September 29, 1950, Doctor, you examined this patient and wrote a report dated October 2nd, 1950.

Mr. Scholz: I haven't got a copy of that.

Mr. Bloom: I have a copy.

Mr. Scholz: Maybe I have.

Mr. Bloom: In which it is stated the patient complained of pain, one in the ball of the left foot as well as in the dorsum of the foot coming on usually when he stands on his feet for long periods, sometimes coming on without apparent reason. Sometimes the pain prevents him from sleeping. He describes it as a hot, constructing sensation.

Two, numbness and parasthesia of the lateral and plantar nerves of the left foot.

Three, pain in the metatarsal phalangeal joint of the right great toe, coming on after strenuous activity.

Mr. Scholz: He has already testified to that.

Mr. Bloom: Not quite, not all of it, counsel. I am going to ask if the patient did so complain on that date.

The Witness: Yes. [60]

Q. (By Mr. Bloom): Your report of that date states as one of your findings there is hyperasthesia over the plantar surface of the foot in the area supplied by the tibial nerve. There is hyperasthesia over the lateral dorsal surface of the foot in the

(Testimony of Edmund J. Morrissey.)

area supplied by the sural nerve. I asked you if that was your finding on this patient on this date.

A. That is right.

Q. According to a report dated June 3rd, 1949, under your signature, Doctor, you state that an examination of the right foot shows a subcutaneous nodule about the size of a bee-bee shot palpable on the dorsal surface of this toe. It is extremely tender to pressure. Was that your finding?

A. That is right. That is what I testified, he was taken to St. Francis Hospital with.

Q. That is the occasion when the metallic body was removed?           A. That is right.

Q. You also state in this report that in the soft tissues lateral to this bone there are three small opaque foreign bodies, referring to the right foot. Was that your finding?

A. What report was that?

Q. June 3rd, Doctor.

A. That was according to the X-ray findings.

Q. Yes. Your X-ray examination showed that to be the condition of the patient at that time, did it?           A. Yes. [61]

Q. Going back to your report of March 27th, 1948—

A. Your Honor, may I interrupt for just a moment.

Q. Yes.

A. My car is parked up there and I have a one-hour parking privilege, and I just want to know how long you are going to keep me here.

(Testimony of Edmund J. Morrissey.)

Q. Probably just for about five minutes more, Doctor. I will make it as fast as I can. In your report of March 27th, 1948, you state there that the patient complained on March 8th, 1948, of certain symptoms which included parasthesia over the left foot, sensory loss over the plantar surface of the lateral side of the left foot; three, limitation of motion of toes, left foot; four, tenderness over the scar on the posterior surface of the medial malleolus; five, slight tenderness over the scar on the lateral malleolus; six, recurrence of trophic ulcer on the plantar surface, left foot, lateral side.

Did the patient make those complaints at that time?       A. Yes.

The Court: Do you have any questions, Mr. Scholz?

Mr. Scholz: Yes, I have, but I have no objection if the doctor wants to move his car and come back.

The Witness: Couldn't I send one——

The Court: Someone can go down and put a nickel in the meter.

Mr. Scholz: The captain will take care of your car if [62] you will tell him where it is.

### Cross-Examination

By Mr. Scholz:

Q. Doctor, the injuries and complaints of Mr. White are confined to his left foot, is that right?

A. That is the one that I paid most attention to

(Testimony of Edmund J. Morrissey.)

because it was the ulcerated area and the thing that was really the disabling factor, but he did complain of his right foot, too.

Q. Does the X-ray show the trophic ulcer?

A. No.

Q. It would not show up in any X-ray?

A. No.

Q. I couldn't see it there; but that has nothing to do with the pain?

A. That is right. That is why I had the X-rays taken, to see if the bone was involved, because it is a pretty deep ulcer, and with those trophic ulcers and the disturbance in sensation there is a possibility of bone involvement, but up to the present time there has been no bone involvement.

Q. Doctor, didn't he give you a history of cellulitis in his right foot or left foot—I think it was his right foot—about 1945?      A. Yes.

Q. Would that have anything to do with this injury?      A. No.

Q. Does your report show that he returned to work on March 24, [63] 1947, and had been working ever since outside—

A. Outside of periods he was in the hospital—yes, I feel that is true.

Q. In his past history did he give you any history of any time spent on Saipan or the South Pacific.

A. He said, "Residence, United States 0 to 36." This was in October, 1947. "Except for 19 months spent in the South Pacific during the recent years."

(Testimony of Edmund J. Morrissey.)

Q. And he gave you that as of October 3rd, 1947?

A. Yes.

Q. He stated he was 36 years old, divorced?

A. One child.

Q. Will you describe his present illness, and please be as accurate as your notes will show, Doctor. Did he describe his illness due to his dropping a 37 mm. shell?

A. He did not say that he dropped it. Would you like me to read it?

Q. Yes, what he said.

A. "On November 22nd, 1946, while collecting cartridges in salvage operations at Camp Beale, a 37 mm. shell was detonated at his feet."

Q. What I meant particularly was he stated it was a 37 mm. shell which was detonated, is that correct?

A. Yes.

Q. Doctor, in that examination of October 23rd you found [64] there were callouses in an area of about an inch in diameter over his left foot?

A. There is a clearly calloused area about one inch in diameter in the center of which is a deep trophic ulcer about one-half inch in diameter over the head of the fifth metatarsal bone on the plantar surface of the left foot.

Q. The metatarsal bone, in ordinary language that I can understand, on the plantar surface of the left foot—where is that?

A. The plantar is the bottom of the foot.

Q. The bottom of the foot?

A. Yes. And the metatarsal is on the lateral



(Testimony of Edmund J. Morrissey.)

side. See, there are three metatarsals. The first is on the medial side and the fifth is on the lateral side.

Q. And that callous was caused by nature trying to protect an injury, would you say?

A. No, it was from putting pressure on that area where he did not feel any sensation.

Q. Doctor, you did not have a chance to read the report of Dr. Moore, did you, before you examined him? A. That is so long ago I can't recall.

Q. The X-rays show the alignment is good, do they not?

A. I do not know whether I have seen any recent X-rays.

Q. I mean the X-rays that you looked at here now.

A. Yes, but all those X-rays show the fracture, and outside of some shortening I imagine it is all right. [65]

Q. There are no fractures noted in the left foot or ankle?

A. Not that I recall, except that one that was supposed to be at the head of the fibula, but that is of no significance.

Q. There was no loss of position? It was right in line, was it not, if there was a fracture?

A. That is right.

Mr. Scholz: I think that is all, Doctor. One more question. I am sorry.

(Testimony of Edmund J. Morrissey.)

Q. There is no evidence of any inflammation, is there, at this time?

A. Not at the present time.

Q. And the motion in the ankle joint is painless?

A. I didn't put any mention here of it being painful.

Q. I am just guessing at it.

A. As I say, I didn't mention it being painful.

Mr. Scholz: I think that is all.

The Witness: Thank you very much.

The Court: The doctor is excused.

Call the next witness, please.

Mr. Bloom: Do I understand, counsel, you have no objection to the hospital records which are under subpoena going in?

Mr. Scholz: Not a bit.

Mr. Bloom: With your Honor's permission, I would like to offer in evidence as plaintiff's exhibit next in order certain hospital records of Mary's Help Hospital. [66]

The Court: No objection to that. They may be received.

Mr. Bloom: I call your Honor's particular attention to an X-ray showing fracture of the neck of the fibula in good position.

(The X-ray report referred to was thereupon received in evidence and marked Plaintiff's Exhibit No. 8.)

Mr. Bloom: Also I subpoenaed from the St. Francis Hospital records which I have not even ex-

amined, but I would like to offer them in evidence, if I may.

Mr. Scholz: No objection.

The Court: It is so ordered.

(The St. Francis Hospital records were thereupon received in evidence and marked Plaintiff's Exhibit No. 9.)

Mr. Bloom: I wonder if we might have a brief recess? A witness has just flown in from Los Angeles. I would like to see him for a moment or two before I put him on the stand.

The Court: No objection. How many witnesses do you have?

Mr. Bloom: I will have two more witnesses and then I will finish with Mr. White, and then we are through. Two short witnesses and then we will finish with Mr. White.

Mr. Scholz: How many witnesses do I have, your Honor? One.

The Court: We will take a short recess.

(Recess.)

Mr. Bloom: If your Honor please, to complete these hospital [67] records, I see we neglected to put in the St. Mary's Hospital records. If the counsel has no objection, I will offer these as plaintiff's exhibit next in order.

(St. Mary's Hospital records referred to were thereupon received in evidence and marked Plaintiff's Exhibit No. 10.)

## ALBERT L. GOLDBERG

was called as a witness on behalf of the plaintiff, and being first duly sworn, testified as follows:

The Clerk: Please state your name, your address and your occupation to the Court.

A. Albert L. Goldberg, 126 Palm Avenue, and I am a partner in the Mars Metal Company.

## Direct Examination

By Mr. Bloom:

Q. Mr. Goldberg, in the year 1946 were you one of the owners of the Mars Metal Company?

A. Yes, I was.

Q. What was and is the business of that concern?

A. Smelting and refining and handling of scrap metals.

Q. One of your employees at that time was the plaintiff, John Phillip White, was he not?

A. He was.

Q. What function in your organization did he have?

A. Well, he both bought and sold materials on the outside.

Q. In reference to a certain contract for the purchase of [68] metals at Camp Beale in 1946, did Mr. White enter a bid on behalf of Mars Metal Company for that particular job?

A. Mr. White handled that whole transaction from its inception.

(Testimony of Albert L. Goldberg.)

Q. Do you remember when he went up there to commence work on the job?

A. Do you mean the day he went up?

Q. Well, the approximate time.

A. Yes, I remember approximately when he went up.

Q. In the month of November, 1946?

A. That is correct.

Q. Prior to his entry upon Camp Beale to carry out the purchase contract, did you receive any warning of any kind from the War Department or any officials at Camp Beale in reference to the work to be performed?

Mr. Scholz: I object to that on the ground that no proper foundation has been laid. He said White handled the entire contract without exception, and why should the War Department or anyone connected with the War Department warn him?

Mr. Bloom: I submit the contract was with Mars Metal Company.

Mr. Scholz: It was signed by White and he handled it entirely. That is the statement of Mr. Goldberg himself.

Mr. Bloom: The contract, if your Honor please, is signed in the name of the Mars Metal Company. It was their contract and was signed "Mars Metal Company, by John Phillip White, [69] Representative." Therefore any warnings of any kind would properly, we think, be directed towards the concern in whose name the contract stood.

Mr. Scholz: But it could not, your Honor. The

(Testimony of Albert L. Goldberg.)

plaintiff has not shown that any officers of the War Department or any officers of the government dealt directly with Mr. Goldberg. I mean if I took a contract up, signed it in my name, and handled it entirely, it might be in the name of John Jones. They don't know John Jones. I signed it and that is that. It is too remote.

Mr. Bloom: It would hardly be the obligation of the government to give a warning to employees of a concern.

The Court: I think the form of the question is objectionable. You might ask the witness what, if any, communications, either prior or subsequent to the entry of the contract, he had with respect to any possible hazards that might be incident thereto.

Mr. Bloom: Very well, your Honor.

Q. What communications, if any, prior to the signing of this contract did you have with the Government or the War Department or any officers or officials at Camp Beale respecting any potential danger at Camp Beale in the performance of the proposed contract?

A. The only connection we had with Camp Beale through the office was the connection of the contract itself, which was [70] discussed with me before submission as a bid.

Q. Yes, but I am asking you, did you receive any communication—

A. The office received the contract after—the contract itself was submitted in the form of a bid. When the bid is accepted it becomes a contract, and

(Testimony of Albert L. Goldberg.)

the contract was mailed from Camp Beale to our office.

Q. All right. Prior to the conclusion of that contract, did you receive any communication or warning respecting potential danger at Camp Beale in the performance of the contract?

A. We did not.

Q. Did you go up to Camp Beale after this accident had occurred?           A. Yes, I did.

Q. When did you go there?

A. I went there the first time the day after the accident occurred. As I recall, the accident—I heard about the accident in the afternoon, and I went there the next morning.

Q. Where did you go? Did you enter the reservation through the main entrance?

Mr. Scholz: I fail to see—I think this is dragging out. I do not see what materiality such a line of questioning would have after the accident occurred.

Mr. Bloom: This is preliminary to a conversation with the officers in charge. [71]

The Court: Ordinarily subsequent events to the accident would be immaterial. What is the purpose?

Mr. Bloom: This is not about any preparations. This is about what was done previously, what procedures were used.

The Court: I will allow it.

Q. (By Mr. Bloom): You went to Camp Beale, did you?           A. Yes, I did.

(Testimony of Albert L. Goldberg.)

Q. Did you go by any of the firing ranges?

A. Not the first time I went. I went directly to the hospital and spoke to the doctor in charge, and then I was permitted to talk to White for a short time.

Q. And after that what did you do?

A. After that I returned to San Francisco and returned to Camp Beale the next day.

Q. The next day where did you go?

A. The next day I went to the Adjutant General's office and inquired for the officer in charge of the ranges.

Q. Were you conducted to that officer?

A. I was conducted to Captain Jones' office. I had been informed that he was in charge of those operations.

Q. Were there any other officers then present?

A. I think not, at the time I went in. There were other officers called in later.

Q. Did you have a conversation?

A. Yes, we did. [72]

Q. At that time and place? A. Yes.

Q. With whom was the conversation?

A. Well, the conversation began with Captain Jones and finished with Captain Jones and a Captain Petrie, and a third captain whose name I don't remember.

Q. Will you tell us what the substance of that conversation was?

A. Well, at the time I discussed the matter with Captain Jones. During the course of the conversa-



(Testimony of Albert L. Goldberg.)

tion I asked the captain what was the normal procedure for decontamination by a firing range of an army so as to permit the army or outside personnel to enter in or upon the range. And Captain Jones told me that the procedure was that a detail from the camp in question would inspect the range, and upon finding any unexploded shells or dangerous material the commanding officer of the detail would report to his commanding officer who in turn would report to Captain Jones' office, in which case it was Captain Jones' duty to call out a decontamination squad from some other base. This squad, whose purpose was to travel between various bases—they were trained in that type of work—and render the field safe, after which it was permissible to enter upon the field.

Now, at that point Captain Jones looked over his records and he became very angry and very agitated because he said to [73] the third captain—not Captain Petry, but to the third captain—that the last report he had was that this firing range was a safe range, that it had been decontaminated.

“Now,” he says, “obviously there were marked duds on this field and some that were not marked, and obviously the field was not decontaminated,” and he was not so notified and that there had been an infraction of army rules.

Q. Was that the full extent of your conversation?      A. No, that was not the full extent.

Q. I meant pertaining to this particular subject.

A. Yes, it was. We discussed the newspaper

(Testimony of Albert L. Goldberg.)

aspects of the accident and various other things, but that was the full extent of the conversation directly pertaining to this accident.

Q. Did Captain Jones do anything when he discovered this state of facts? A. I don't know.

Q. Not in your presence, in any event?

A. Not that I recall in my presence.

Q. After this conversation occurred, did you stay on the base?

A. After this conversation occurred, I went away with a sergeant Hodges over to the range. I wanted to see where the accident had happened.

Q. Have you got reference to the strafing range which is depicted on this diagram as the area between targets and target finders, north of the road which runs— [74]

A. Well, I wouldn't know whether it was north, south, east or west. I know we made a big circuitous trip.

Q. Did you go to the strafing range?

A. We went to the strafing range.

Q. What happened, if anything, there?

A. Well, we examined the ground, and as a matter of fact, we saw a couple of fairly large shells. I would not be familiar with what they were. But I know after we returned Sgt. Hodges sent a detail of a couple of men to out to mark another shell with a red flag that had not previously been marked.

Mr. Bloom: I guess that is all. Thank you.

(Testimony of Albert L. Goldberg.)

Cross-Examination

By Mr. Scholz:

Q. Mr. Goldberg, who was the third officer that you mentioned, the third person?

A. I don't recall his name. I know he was a captain

Q. Do you know what his purpose of being there was?

A. I assumed his purpose—I assumed the reason he was there was because I had some connection—

Q. Not what you assumed. I asked you if you knew what.

A. I know he was called in by Captain Jones along with Captain Petrie.

Q. You asked Captain Jones to explain to you the normal procedure. What is normal procedure or the normal procedure of the army in decontaminating ranges? Is that what you asked?

A. Yes. [75]

Q. When he explained that, didn't he state that when any artillery is fired that sometimes the projectile hits the ground but it does not explode, and that is known as a dud, isn't that correct?

A. I don't recall his explaining that to me. However, I do know that that is true.

Q. That is normal procedure, isn't it? I mean, that is a normal detonating of a dud. It is a shell which has been fired and not exploded.

A. Technically I wouldn't know. I would think

(Testimony of Albert L. Goldberg.)

a dud might be other things, too, but it may be true.

Q. He did not say anything to you about that at all?

A. I don't recall his having discussed that with me.

Q. Do you recall that if he did explain the normal procedure of firing, that while they are firing they have a range officer present at the time of the firing?

A. We did not discuss during that conversation what was done at any time during use of the range as—during firing practice.

Q. I know that, but that is part of the standard operating procedure, is to first locate your shells, isn't it?

Mr. Bloom: That calls for the opinion and conclusion of the witness, your Honor. I object to it on that ground.

Mr. Scholz: This is cross-examination.

The Court: Overruled.

The Witness: What was the question again? [76]

Q. (By Mr. Scholz): It is part of the standing order of procedure, S.O.P., Standard Operating Procedure, before you can render harmless any dud or any shell you had to first locate it?

A. You obviously have to find it before you can get rid of it.

Q. You asked him for the normal operation and the normal procedure, didn't you?

A. I asked him——

(Testimony of Albert L. Goldberg.)

Q. The normal procedure of decontaminating a range?  
A. That is right.

Q. Didn't he explain during the firing they have a range officer and also a safety officer in the tower; they watch the artillery when they fire, and if that artillery does not explode, they say, "Mark dud."?

A. No, we didn't discuss that. We didn't discuss about any officer marking duds at the time they were fired. I know we didn't discuss anything of that nature.

Q. You know from your own general knowledge that there are shells which are fired and are unexploded?  
A. I know it now.

Q. Didn't you know it before? How old are you?  
A. I am 40—

Mr. Bloom: Your Honor, that is argumentative and also the opinion and conclusion of the witness. [77]

Mr. Scholz: I asked him if he knew.

The Court: You might ask him about his experience in these matters.

Q. Have you had any, either professionally as a soldier, as an observer, or as a civilian?

A. I would say I think I know when to be careful, yes. I think I would know when there might be an unexploded shell around.

Q. (By Mr. Scholz): And you do know, as a matter of general knowledge, that when shells are fired, sometimes they do not explode?

A. Oh, I know that.

Q. And you know those shells that land and do

(Testimony of Albert L. Goldberg.)

not explode are dangerous?      A. Of course.

Q. And you know that sometimes those shells go into the ground and can not be located?

A. That I wouldn't know necessarily.

Q. You said you went out with Sgt. Hodges to the strafing range?      A. Yes.

Q. How many ranges were there out there, Mr. Goldberg?

A. Oh, I don't know. I know there were a number of ranges immediately adjoining that whole area. I understood that there were many types of ranges in that immediate region. [78]

Q. In going out, did you notice any signs on the road driving out there that had "Beware of the Duds," or words to that effect?

A. I don't recall seeing any. There might have been, but I don't recall seeing any.

Q. In other words, you don't remember. This happened four years ago?      A. That is right.

Q. And you do not recall now whether you saw them or not?

A. I don't recall having seen any.

Q. How did you know that that was the strafing range as opposed to any other ranges they had out there? The anti-tank range, for instance?

A. Because Sgt. Hodges brought me there.

Q. And that is the way you knew it?

A. That is the way I know it. I never saw a strafing range before.

Q. And you saw a shell out there, did you say?

A. I saw a shell very close—well, may I point out here——

(Testimony of Albert L. Goldberg.)

Q. Are you familiar with this here?

A. Well, I have a general recollection, yes. I assume these are the targets and those are the target finders.

Q. That map has been shown to you before?

A. No, but I was out on that field.

Q. I am talking about this. Have you ever seen this before? [79]

A. Yes, I saw that map once before.

Q. Where? A. In the attorney's office.

Q. Mr. Bloom's office? A. Yes.

Q. Now, you started to say, when I interrupted you, you saw a shell out there somewhere in what you call the strafing range.

A. Well, I don't know. So far as I know, I know there was a road that went around here somewhere, and we walked over a field, and on the way over there we saw, to my best recollection, it was some place here, possibly a hundred yards or so away from what I assumed was actually the strafing range.

Q. What was that shell like that you saw?

A. It was a large piece of ammunition. I wouldn't know anything else about it.

Q. How large a piece was it?

A. Oh, possibly four inches by 12 to 14, as I recall. I might be out a few inches either way, but it looked to me like a pretty important piece of artillery.

Q. You know what we mean, so we know the

(Testimony of Albert L. Goldberg.)

terminology, we are speaking in the same terminology—a shell means the complete projectile; in other words, it includes the loading charge, the fuse, what you might call the warhead, and everything else. Is that what this was? [80]

A. I know it was obviously a piece of ammunition. Whether it was complete or not, I wouldn't be in a position——

Q. You never looked at it?

A. Oh, sure, I looked at it, but I didn't pick it up.

Q. You didn't examine it?

A. Not too closely.

The Court: Did you distinguish between the casing and the warhead itself?

A. That is the point I am making. I don't remember whether the casing was on it or not.

Q. You made that distinction. Anyone knows that.

A. Of course.

Q. The casing and the warhead.

A. That is right, and I don't remember whether there was any casing on it or not. I know it was a substantial piece of ammunition. Whether it was exploded or not, I wouldn't know either.

Q. You wanted to keep away from it?

A. I just stepped away from it.

Q. This was marked, was it?

A. No, this particular one was not marked.

Q. Was it plainly observable on the surface of the ground?



(Testimony of Albert L. Goldberg.)

A. Yes, it was plainly observable. There was grass growing——

Q. Who directed your attention to it?

A. I don't remember whether I saw it or the sergeant saw it. [81]

Q. What did you do, if anything, after you observed it?

A. We kept away from it and the sergeant said, "That is the one about which the sergeant sent a detail to mark." Now, there was grass, this brown grass growing, and when you say was it discernible clearly, it was not discernible from 50 to 75 feet.

Q. At least you saw it and the sergeant undertook to do something about it?      A. Right.

The Court: Let us go from there.

Q. (By Mr. Scholz): Did Mr. White work on a contingent on this contract or was he on a set salary?

A. Mr. White at that time was on a salary.

Q. Not on commissions?

A. No, he was not.

Q. On this contract he was on a straight salary?

A. Yes, he was.

Q. What was the particular record that you said Jones said he didn't know anything about?

A. Well, I will explain to you. I didn't receive the records, of course, at all. All I know is while Captain Jones was explaining to me what his normal procedure was, he looked through his papers and he complained very bitterly that there had been an infraction of army rules, that he was not properly notified as to the condition of the field previous to White's [82] going on it.

(Testimony of Albert L. Goldberg.)

Q. You do not know what infraction of an army rule it was? A. No, I do not.

Q. You do not know why Captain Jones called this third captain in? A. No, I do not.

Q. You do not know what his official capacity was?

A. I have no idea what his official capacity was.

Q. You do not know what the third captain had to say about it?

A. I remember that he had something to say, but I don't remember what it was.

Mr. Scholz: That is all.

Mr. Bloom: That is all.

### JOHN PHILLIP WHITE

resumed the stand in his own behalf.

The Clerk: Let me remind you that you have been heretofore sworn and you are still under oath.

#### Direct Examination

(Continued)

By Mr. Bloom:

Q. Mr. White, when you were last on the stand we were talking about your physical condition and complaints that you have made, and we were up to the point where you were under the treatment of Dr. Morrissey, you will recall. What did Dr. Morrissey do for you, just briefly, in the beginning? [83]

A. Immediately after I came under Dr. Morrissey's care?

Q. Yes.

(Testimony of John Phillip White.)

A. He said, "Go to the hospital." I went to the hospital—

Mr. Scholz: That is objectionable.

The Court: Overruled.

The Witness: Dr. Morrissey said, "Go to the hospital. You are going to have to have an operation, but we want the ulcer healed before we operate. Go to the hospital and stay in bed." Which I did do for six weeks.

Q. (By Mr. Bloom): What hospital?

A. St. Mary's.

Q. Then what happened?

A. Then Dr. Morrissey operated.

Q. How long did you remain in the hospital?

A. He operated the first time, and then ten or twelve days later he made an inspection of the wound, and then I got out of the hospital, about February 1st or 2nd.

Q. At that time were you using canes or crutches?      A. I left the hospital on crutches.

Q. How long did you continue to use your crutches?

A. I think I used the crutches for five to six weeks.

Q. Thereafter what happened in reference to your physical condition?

A. Well, my foot—my left foot, that is—was always in pain. It is now. But in addition to the constant pain, I would have [84] periodic swellings of the foot and intensification of the pain, and a breaking open of the ulcer.

(Testimony of John Phillip White.)

Q. And that condition was called to Dr. Morrissey's attention, was it not?

A. It was. I was seeing Dr. Morrissey regularly at that time every week.

Q. What was the next treatment of any significance that Dr. Morrissey gave you?

A. I got out of the hospital in February, and on several different occasions, because of the condition, Dr. Morrissey told me, "Well, you go to bed Friday and you stay in bed until Monday again. Give your foot two or three days' rest, even though you can't stop working completely."

Q. Did you do that on a number of occasions?

A. Yes, on a number of occasions I had done that.

Q. After that did you require any further medical attention?

A. Well, in the summer of 1948 my foot was in a pretty bad way, and I was put up in St. Francis Hospital where I stayed one full month. That was either August or September, 1948.

Q. That was at the direction of Dr. Morrissey also?

A. Yes. At the end of that time the ulcer had healed again and I was out once again. Once again I got out on crutches, graduated from crutches to a cane, and I would say three months after I was out of the hospital I was walking without the assistance of either. [85]

Q. What happened next, as far as your medical treatment was concerned?

(Testimony of John Phillip White.)

A. I continued to see Dr. Morrissey regularly, and, I don't know, it was perhaps two or three days in the next year that the ulcer broke open again, and I would get back on the crutches. I couldn't afford to completely stop work; I would get back on the crutches and then in 1949, in November of 1949, I was in the hospital for a different illness, and while I am in the hospital, my foot goes bad, not as a result of strain or pressure on it, because it happens while I am in the hospital. I got out of the French Hospital for another illness and Dr. Morrissey puts me back in St Mary's Hospital last November.

Q. How long were you in St. Mary's on that occasion?

A. I believe it was about three weeks. That may be a little longer or a little less.

Q. The treatment there was just complete rest, is that right?

A. Dr. Morrissey's assistant removed the ulcerated flesh at that time and they gave me penicillin. The foot had become quite swollen. It was twice its normal size. The ulcer was open. But they started giving me penicillin and they continued giving me penicillin for ten or twelve days, and the foot returned to its normal size, and when it returned to its normal size I left the hospital once again on crutches.

Q. About when was that? [86]

A. It was about December 5th or 6th.

Q. What happened, if anything, thereafter?

(Testimony of John Phillip White.)

A. Since then I have not had to go to hospitals. On several different occasions I had to go to bed from Friday to Monday because the minute my foot begins to hurt or swell, if I get off it, it gives me relief for the time being. It permits me to go on.

Q. Will you please tell his Honor what your present symptoms are, that is, how they manifest themselves to you?

A. I have a sensation of having my left foot encased in a tight shoe with an appreciable rise in the temperature. The foot feels warm and tightly bound. In the process of my work I find it impossible to walk for any great distance. I no longer even try to run. Once in a while I will try to speed up a little, but it is impossible for me to run without such pain as to make it impossible. I have difficulty in climbing up, of course, although I can now walk downhill fairly well. As far as limitation of my normal activities is concerned, I can no longer bowl or run or hike, which were formerly standard activities with me.

Q. Do I understand that your condition has interfered in your work?

A. The condition has interfered with my work.

Q. In what way?

A. To the extent that I have lost a number of days because I [87] stayed in bed to keep off the ground on days when I otherwise might have worked. It has interfered that way. It has also interfered in that even though I have worked at times when the foot was hurting particularly, I have had to do less profitable pieces of work. Pri-

(Testimony of John Phillip White.)

marily I am a buyer and a seller, and on those days when my foot does not permit me to get about much, then I do less profitable things.

Q. What about the question of sensation in the feet at the present time?

A. The area of insensitivity is almost the whole of the bottom of the foot. Slightly above the bottom on the outer side of my foot there is an area in which sensation is much more sharp and much more intense than is normal. So between the intensity of the bottom of the foot and the hypersensitivity of the side of the foot, I can't feel some things I should feel. I mean, I don't feel heat or cold on the bottom of my foot. But the slightest heat of any sort on the left—on the outer side of the left foot causes a great deal of pain.

Q. How about the question of pain at the present time? Do you experience any pain?

A. The pain is constant.

Q. How would you describe it?

A. I said once before that it is a matter of having on a tight shoe with a rise in the temperature.

Q. Does this interfere with your sleep? [88]

A. Normally, no, but any sustained activity requiring standing on my feet or walking on my feet will so intensify this pain that it does interfere with my sleep.

Q. When this ulceration occurs, are there any different symptoms that you experience?

A. The level of pain rises. However, there is no specific sensation directly to the ulcerated area.

(Testimony of John Phillip White.)

Q. Going back to the question of your knowledge of this area, the strafing range, the anti-tank range adjacent to it, did you at any time that you were at Camp Beale notice or observe any warning signs any place in that area? A. I did not.

Q. You saw no signs on any fences or posts?

A. I did not.

Q. Your attention was not called to any signs or warnings? A. It was not.

Q. At any time that you were on the reservation, is that correct? A. That is true.

Q. Mr. White, in paragraph 8, page 3 of your first amended complaint, you allege that you sustained financial loss as a result of the accident and the injuries, and you stated that your earnings from your employment as a metal salesman at the time of this accident were approximately \$250 per month, is that correct? [89] A. That is true.

Q. You further state that as a result of the accident and the injuries, that you were unable to engage in your employment for a period of 17 weeks, to your damage, in the sum of \$1,000. I am going to ask you if that is a true statement.

Mr. Scholz: That calls for a conclusion, I think.

Q. (By Mr. Bloom): Well, did you sustain that loss and, if so, over what period of time?

Mr. Scholz: Same objection.

The Court: Overruled.

The Witness: I did have the loss, 17 weeks is four months at \$250, is \$1,000.

Q. (By Mr. Bloom): When did that loss occur? Was that your initial loss?



(Testimony of John Phillip White.)

A. From the date of the accident until the date of my first return to work.

Q. You then state for a period of 15 weeks you were unable to engage in your employment thereafter, whereby you lost \$1,400, and I will ask you if as a result of this accident and the injuries, whether you thereafter lost that sum in wages?

Mr. Scholz: Same objection.

The Court: Overruled.

A. I did.

Q. (By Mr. Bloom): And that 15-week period, roughly, would cover what period of time? [90]

A. It covers the time I was in the hospital the second time or second long period, the time Dr. Morrissey performed his operation.

Q. And of course during that period you did not conduct any of your work, is that right?

Mr. Scholz: That is objected to as leading and suggestive.

The Court: Overruled.

A. That is true.

Q. (By Mr. Bloom): And you did not receive any wages? A. No.

Q. You further allege that as a result of the negligence and the injuries that you were able to engage in your employment in a limited capacity only for 23 months, whereby you sustained further damage and loss of wages in the sum of \$2,300?

Mr. Scholz: Same objection.

The Court: Overruled.

Q. (By Mr. Bloom): Is that correct?

A. I stated that.

(Testimony of John Phillip White.)

Q. When you stated that you were unable to engage in your employment, that is, you were unable to engage in it in a limited capacity only, will you tell the Court what you mean by that?

A. My job was primarily to buy and to sell. With the necessity of using crutches, I could not see as many people. With the days that I had to spend away from the work, even when I was not in the hospital, I lost between a sixth and a seventh [91] of the time. Although I was making \$250 at the time of the accident, my wages have been raised to \$400 by the time I was in the hospital the second time, and then when I got out of the hospital, I was on a commission basis, and although I did not work between a sixth and a seventh of the time, I was making between six and seven hundred dollars a month on commissions, and I feel had I been permitted to work all the time, I would have made at least another \$100.

Mr. Scholz: Same objection. Calling for a conclusion.

Q. (By Mr. Bloom): So you calculated your loss upon that basis?

The Court: I will overrule the objection.

A. Yes.

Q. (By Mr. Bloom): And you calculate as a consequence thereof you lost \$2,300? A. Yes.

Mr. Scholz: Same objection.

Q. (By Mr. Bloom): This diagram or map, Mr. White, was made according to your directions and general supervision, is that correct?

(Testimony of John Phillip White.)

A. That is true.

Q. And as far as you can recall, it is a fair representation of the area in question, is it not?

A. Yes.

Mr. Bloom: If your Honor please, I offer this diagram in [92] evidence as exhibit next in order.

The Court: For the purpose of illustration?

Mr. Bloom: Yes, your Honor.

The Court: All right.

(The diagram referred to was thereupon received in evidence and marked Plaintiff's Exhibit No. 11.)

Mr. Bloom: Your witness.

The Court: We will take the afternoon adjournment until tomorrow morning at 10:00 o'clock.

(Thereupon an adjournment was taken to tomorrow, Friday, at 10:00 o'clock a.m.) [93]

Friday, November 3, 1950, 10:00 A.M.

The Clerk: John Phillip White v. United States of America, on trial.

Mr. Bloom: If it please your Honor, my clients went out the door for five minutes, thinking there would be argument here. They will be back in a moment or two.

The Court: All right.

Mr. Bloom: I ask the indulgence of the Court for a few minutes.

Is your Honor ready to proceed?

The Court: Yes, sir.

## JOHN PHILLIP WHITE

resumed the stand in his own behalf.

Mr. Bloom: Your witness, counsel.

## Cross-Examination

By Mr. Scholz:

Q. Mr. White, how old are you? A. 39.

Q. What was your occupation in 1941?

Mr. Bloom: I do not know what the relevancy of that is, your Honor.

The Court: The objection is overruled.

A. Part of 1941 I was in the metal business.

Mr. Scholz: I did not hear you. [94]

A. In part of 1941 I was in the metal business.

Q. The first part or the second part?

A. The first part. In the latter part of 1941 I took a position with the Newfoundland Base contractors to build an air base in Newfoundland.

Q. Build air bases?

A. In Stevensville, Newfoundland.

Q. In the first part of 1941 you were in the metals business, and what was your particular business in that business?

A. Basically the same as this now. I am in the metal business for the collection of metals and metallic residues from industrial plants, and I have taken various types of jobs from the reclamation of lead sulphide at oil refineries to reclamation of lead-tin oxides from various factories. As to the particular jobs I might have had in 1941, I don't recall.

Q. You investigated all the possibilities of recla-

(Testimony of John Phillip White.)

mation of any non-ferrous or ferrous metals, is that what is was?

A. No ferrous metals to speak of. Non-ferrous.

Q. Then in the latter part of 1941 you entered into a contract to assist or build airports up in Newfoundland? A. That is true.

Mr. Bloom: May it be understood, your Honor, I object to this line of questioning?

The Court: What is the purpose of this line of questioning? To show a general familiarity with the business? [95]

Mr. Scholz: The purpose is to show familiarity with the operations.

The Court: All right.

Q. (By Mr. Scholz): Were you in the construction of the airports?

A. I was in a phase of the construction. I was in the mechanical maintenance department as a junior executive. I handled cost accounting, time-keeping, placement of personnel in the mechanical maintenance department.

Q. How long did that last?

A. I was there until September, 1942.

Q. September of 1942? A. Yes.

Q. And then from September of 1942 what did you do?

A. I returned to this country and enlisted in the Air Force.

Q. How long were you in the Air Force?

A. I was in the Air Force, but I was kept in a reserve status because of my age and heart condi-

(Testimony of John Phillip White.)

tion for a number of months. I saw no active service—

Q. That is not my question.

A. You asked what I did, did you not?

Mr. Scholz: Will you repeat the question?

(Question read.)

A. In a reserve status from September to August of the following year. [96]

Q. To August, 1943? A. Yes.

Q. While you were enlisted during that time, were you on active duty with the Air Force?

A. I was not.

Q. How can you enlist in the Air Corps and not be on active duty?

Mr. Bloom: If your Honor please, may it be understood that I object to this entire line of questioning on the ground it is improper cross-examination, not within the scope of the direct, and furthermore, it is incompetent, irrelevant and immaterial.

The Court: Overruled.

The Witness: Would you read the question, sir?

(Question read.)

A. There are 10,000 rules in the army with which I am not familiar, and I happened to do it. As to the reasoning of the army staff, I do not know.

Q. (By Mr. Scholz): As I recollect, you said you left the Air Corps in 1943? A. That is true.

Q. What did you do then?

(Testimony of John Phillip White.)

A. On the day I received my release I enlisted in the Seabees.

Q. What did you do in the Seabees?

A. Will you be more specific? [97]

Q. Yes. What did you do in there, in the Seabees?

A. Your Honor, I would like to be helpful, but any man in the service—do you mean what was my rating? What were my duties? Where was I stationed?

The Court: What were your general duties in the Seabees?

A. During the time I was in this country—

Q. What was your rating?

A. My rating was Machinist's Mate Second Class. My duties during the time we were in training in this country before going overseas were for the most part instructor.

Q. (By Mr. Scholz): And you followed the regular course of instruction? What particular battalion was that Seabees that you were in?

A. I was in boot camp at Camp Perry until the 133rd Seabees was formed. When the 133rd Seabees was formed, I was put in Company D, and as soon as the battalion was formed—

Q. You went into the 133rd Seabee Battalion, is that right?      A. Yes.

Q. When you were at boot camp, they gave you the normal course of instruction that Seabees have, is that correct?      A. I assume so.

Q. Included in that normal course of instruction

(Testimony of John Phillip White.)

is instruction on demolitions or familiarization course, is that not true? [98]

A. That is not true.

Q. There was no instruction on demolition or familiarization course in that course that you took?

A. Familiarization with what?

Q. Demolitions.

A. In Seabee parlance demolition——

Q. No, answer my question.

Mr. Bloom: He is trying to, I think, counsel.

The Witness: In Seabee parlance demolition means demolishing buildings with any tools available from a hammer to a stick of dynamite.

Those of us who had had any experience in demolition of buildings, getting things out of the way were assumed to have such training as we would need along that line. As Seabees we were presumably tradesmen to some extent, and we were supposed to know things.

Q. Then you had experience in demolitions under the term as you used it?

A. Yes, I have had experience in that line.

Q. Did you leave for overseas?           A. Yes.

Q. When?

A. Some time in the spring of 1944.

Q. Where did you go? To Saipan?

A. Not immediately. [99]

Q. You went to Honolulu first, of course?

A. I went to Honolulu.

Q. Pardon?           A. I went to Honolulu.

Q. And then from there you went to Saipan?



(Testimony of John Phillip White.)

A. That is true.

Q. Pardon? A. I said that is true.

Q. When did you arrive in Saipan?

A. Some time in the fall of 1944.

Q. That was before the island had been secured by the United States Army or Marine Corps?

A. There is a difference in terminology between the Army and the Marine Corps.

Q. They had not declared the island secured at that time, had they?

A. It was secured under Marine terminology. It was not secured until Army terminology.

Q. You are very familiar with this, I see.

Mr. Bloom: If your Honor please——

The Court: These are nice definitions. I am not altogether concerned with them or about them. We are not getting into the case. Counsel, will you proceed with your point and let me have the nature of your cross-examination? I am not interested in these phases. [100]

Q. (By Mr. Scholz): Overseas the Seabees were familiar with demolitions, weren't they? I mean, they had to use them?

A. Yes, we removed various buildings that way in the way of what we wanted to do.

Q. And you were familiar with the various artillery shells? A. No.

Q. You did not know anything about artillery shells?

A. I knew nothing more than any other layman would know.

(Testimony of John Phillip White.)

Q. Or any other Seabee?

A. I didn't know nearly as much as a member of the Seabees.

Q. Have you ever seen any artillery fired?

A. Yes.

Q. And you knew that sometimes artillery shells are fired and after they are fired they do not explode and they are called duds?

A. In general, I would say that is true.

Q. I say, do you know it?

A. Know it? I think that would depend upon the definition of "know," sir.

Q. Well, knowledge of a fact.

A. In that event, I would say no.

Q. You have the general knowledge?

A. I have a rough idea of what a dud is.

Q. You have seen artillery fired?

A. I have seen artillery fired. [101]

Q. And you have seen shells strike that did not explode? A. I have not.

Q. How long were you in Saipan?

A. I don't remember the number of months, but it was a long time.

Q. Where did you go from Saipan?

A. San Francisco.

Q. You came back here. You heard the statement of Dr. Morrissey the other day that you were in the South Pacific 18 months?

A. That is approximately correct.

Q. When you came back here you went with the Mars Metal Company?

(Testimony of John Phillip White.)

A. After several months' resting.

Q. When did you join the Mars Metal Company?      A. On July 26, 1946.

Q. This accident happened November 22nd, 1946, did it not?      A. That is true.

Q. At that time were you residing at 749 Octavia Street, Apartment 316, San Francisco?

Mr. Bloom: If your Honor please, I do not know what these collateral matters have to do with the issue.

The Court: I will permit it until we see the nature of the subject matter sought to be elicited. You may proceed.

A. Actually, no. [102]

Q. (By Mr. Scholz): Where were you residing then?      A. In a hotel.

Q. Did you ever reside at 749 Octavia Street, Apartment 316?

A. Your Honor, that depends upon the definition of "reside." I am not trying to be evasive.

The Court: Explain it, then.

A. But officially my residence was at 749 Octavia Street.

Q. (By Mr. Scholz): That is sufficient. Initially, that was your residence. Do you recall a statement that you made on November 27, 1946, at Camp Beale, California? I hand you herewith, not a statement, an affidavit sworn to before the summary court officer up there. I hand you this affidavit or what purports to be an affidavit signed by you and ask you if that is a copy of the statement you signed.

A. It seems to be.

(Testimony of John Phillip White.)

Mr. Scholz: I will offer that in evidence, if your Honor please, as Defendant's Exhibit A.

Mr. Bloom: If your Honor please, I do not understand why it is a proper exhibit. There is nothing in there that I can see by way of impeachment. It would appear to me it is improper to tender it in evidence.

The Court: Mr. Scholz, you can lay the foundation for statements made at other times inconsistent with a person's testimony given at the time of trial in the nature of impeachment under the rules. You can lay the foundation for [103] impeaching evidence in the nature of declarations made under oath, but there is no foundation thus far laid for the introduction of the statement. You might specifically ask the witness if at a certain time and place he did not say the following. Thus far there hasn't been any foundation laid.

Mr. Scholz: That is what I wanted to do, but I first wanted that in evidence.

The Court: No, ask him if that at a certain time he did not make a certain statement.

Mr. Scholz: I should have said for identification instead of in evidence.

The Court: Mark it for identification.

Mr. Scholz: Then I was going to go through it.

The Court: It may be marked for identification.

(The document referred to was thereupon marked Defendant's Exhibit A for identification.)

(Testimony of John Phillip White.)

Q. (By Mr. Scholz): I hand you herewith Defendant's Exhibit A for identification and ask you if this question was asked you and if you made this statement:

“Where did you obtain Lang and Vanderpool?”

“A. From the MP barracks.”

Is that correct? A. Yes, that is true.

Q. Then the second question: “Did you just go into the barracks and solicit help? [104]”

“A. Yes, I asked if anyone wanted to work gathering brass for \$1.00 an hour.”

Is that a statement you made? A. Yes.

Q. The next question: It is marked “A”, but it means Question.

“Q. Whom did you ask if you could go into the barracks and get the men?”

“A. I asked no one specifically if I could go into the MP barracks and get men.”

Did you make that answer to that question?

A. That is true.

“Q. Why did you pick on that particular barracks?”

“A. Having been in the service myself and knowing MPs, I went in there.”

Is that a correct statement?

A. That is true.

Mr. Bloom: If your Honor please, I do not want

(Testimony of John Phillip White.)

to interfere with the procedure, except I do not see any inconsistencies or impeachment with any other statements.

The Court: I will allow it. You are probably coming up to the point. I will allow it. This is preliminary.

Mr. Scholz: Anyway, he said he asked the executive officer if he could get men. I believe it was on direct examination. And that impeaches that part of it. [105]

That is not so material. I am just bringing it up to the rest of it. I have to connect it up.

“Q. Just what happened after you started working around 11:00 o'clock or so?

“A. We went out there and I showed the men my bags and wirepullers and a number of cartridges already stacked up. I explained to the men that I wanted the empty cartridges, that I knew there were two duds out there, so leave them alone, secure them. That is all I wanted, was empty cartridges. After we had worked about an hour I said, ‘We have worked an hour. You can see clearly how these things are scattered. You should have some idea how quickly you can pick them up. If you want to pick them up at \$2.00 a sack rather than \$1.00 an hour, it is all right with me.’

“They agreed they would pick them up at \$2.00 a sack. It so happened Lang was picking up immediately adjacent to where I was picking up. I had just deposited a couple of hand-

(Testimony of John Phillip White.)

fuls into the sack when Lang handed me a projectile and said, 'Take a look at this.' I said, 'It is nothing but iron, not enough brass to pay for the salvage. I don't want it.' And then I just dropped it."

Did you make that statement at that time?

A. I probably did.

"Q. Are you an ex-service man? [106]

"A. Yes. I was a Seabee on Saipan and had some knowledge of ammunition, but not much."

Is that a correct statement?

A. It sounds reasonable.

"Q. About what size would you say the shell was? A. It was a 37 mm."

Did you make that statement?

A. I think so.

Mr. Scholz: I will offer this in evidence now, if your Honor please.

Mr. Bloom: If your Honor please, I will object to its being offered in evidence. I assumed the purpose was to impeach by showing conflicting statements. I see nothing of any conflict save possibly on minor collateral matters.

The Court: It may be argued—I am not asserting now as to the nature of the conflict—it may be argued by the Government that with respect to the one phase of this statement particularly having to

(Testimony of John Phillip White.)

do with the receipt of the dud and the dropping thereof, that there is a conflict of testimony. This witness has testified it was thrown to him by another. To that extent there may well be a conflict. I am not discussing the matter now. It may be argued hereafter. But I will allow it for that purpose.

(Defendant's Exhibit A was thereupon received in evidence.)

The Court: And as to his general knowledge of the [107] terrain, method of operation and the like.

Q. (By Mr. Scholz): Mr. White, how did you know that was a 37 mm.?

A. I have a reasonably accurate eye for measuring things.

Q. I am sorry. I can't hear.

A. I said I have a reasonably accurate eye for measuring things. I know how much a millimeter is.

Q. While you were handling it, it looked like it?

A. No.

Q. You say you measured with your eye, is that correct? A. Yes.

Q. When did you measure it with your eye?

A. While it was in the other man's hand.

Q. From glancing at it or, as you put it, measuring it with your eye, you knew it was a 37 mm. shell?

A. Once again, I didn't know it was a 37 mm.



(Testimony of John Phillip White.)

However, I have sufficient acquaintance with the terminology to know that 37 is a common size, approximately an inch and a half in diameter. The sergeant had shown me a number of solid chunks which he had said were 37 mm. anti-tank projectiles.

Q. He had shown you a number of them out at the target range?

A. No, at the range office. I assumed it was a 37 mm.

Q. You had seen, as you have stated, a 37 mm. shell before, is that correct?

A. This is not a shell. It is a missile, a projectile. [108]

Q. I hand you herewith—I think it is your exhibit, Plaintiff's Exhibit 4—and ask you, does this correspond with the shell that you handled?

A. A portion of this item from the crimp to this end of it does.

Q. This portion from the crimp here to this end here does, and this portion was not connected, is that correct?

A. It had nothing to do with it.

The Court: Pardon me. I was distracted by the noise. Will you repeat that?

Q. (By Mr. Scholz): The portion from the crimp—what do you call that?

A. I assume it is the nose.

Q. The nose was there, but from the crimp to where—

(Testimony of John Phillip White.)

A. This that I have always called the cartridge portion was not there.

The Court: Just the firing end of it?

A. Just the head of it, Judge.

Q. What is that head called technically?

Mr. Bloom: That is the fuse head.

Q. (By Mr. Scholz): This is the projection: the powder which projects the warhead—that is a general term—it is not correct terminology. And then when it hits on the nose here, this part explodes.

The Court: The casing was not present, just the warhead? [109]

The Witness: It was just the front end of it, just the projectile, that portion which is cast out.

Q. (By Mr. Scholz): I believe you stated on direct examination you went up to Camp Beale about September, 1946, and you saw either the commanding officer or the executive officer, is that correct? A. That is true.

Q. Didn't at that time either the executive officer or the commanding officer—I think you stated you did not know which—direct you to see a range officer, Captain Jones?

A. I don't believe so. I believe Sgt. Hodges was called in directly without going through channels.

Q. Did you know Sgt. Hodges was under Captain Jones? A. No.

Q. You did not know that? A. No.

(Testimony of John Phillip White.)

Q. Did you know what Sgt. Hodges' duties were up there?      A. Roughly.

Q. Well, was he a range sergeant?

A. I was told that he was.

Q. Who told you? Captain Jones?

A. No, the gentleman who provided me with him as a guide the first time I was there.

Q. Before commencing this work up there, you had to coordinate things with the range officer, didn't you? [110]

A. Before the actual operations?

Q. Yes.      A. Yes.

Q. You went to see Captain Jones, who was range officer at that time, did you not?

A. I went to see a captain who was the range officer.

Q. Who was range officer?      A. Yes.

Q. Do you recognize Captain Jones here?

A. I don't recognize him, but I wouldn't say that it was not he.

Q. When you came in here, didn't you bow to him and acknowledge him when you first came in here yesterday?      A. Oh, yes.

Q. Didn't Captain Jones at that time warn you that there might be duds out there?

A. Out where?

Q. Out on the ranges, particularly the strafing range.

A. I was warned that there might be duds on the areas where I had not yet investigated, the straight artillery ranges where I had not yet in-

(Testimony of John Phillip White.)

investigated. As to the strafing range, I was given no notice that there were any—that there was any possibility of unmarked duds on the strafing range.

Q. How many ranges were there up there?

A. I don't know. [111]

Q. How many do you recall? A small arms range——

A. Two rifles, two machine, one pistol, the strafing range, the mock town where street fighting was practiced, and I was told that there were—then the anti-tank range shown on the sketch here, and then I was told that there were artillery ranges a number of miles over. I never went onto those artillery ranges.

Q. They warned you about duds on all the ranges except what you call the strafing range, is that correct? A. No, that is not correct.

Q. What did you say then when I asked you whether they warned you about duds? Didn't you say they warned you on all ranges except the strafing ranges? A. No, I did not.

Q. I am asking you, what did you say?

A. I said I was warned of the possibility of duds on those ranges. I had yet to investigate them. There was no warning about duds on the machine gun, the pistol, the rifle ranges or strafing ranges which I had investigated.

Q. Oh, I see. You had made a complete investigation of that, then, prior, before working?

A. No, I had not made a complete investigation.

(Testimony of John Phillip White.)

Q. You made an investigation then. I do not know whether it was complete or not.

A. Oh, yes, I had made an investigation. [112]

Q. However, out there they did show you some duds on what you call the strafing range, did they not, and you marked one here as X?

A. I was shown that dud. It was marked.

Q. That was a 37 mm. dud also? A. No.

Q. What kind of dud was that?

A. It is my opinion it was a 75 mm.

Q. 75? A. Yes.

Q. You said that was a freak because the sergeant said they do not usually find those kind of duds on a strafing range, is that right?

A. I said that the sergeant said that it was a freak.

Q. Is that what you said?

A. Yes, I said the sergeant said it was a freak. I didn't say it was a freak.

Q. No, I said the sergeant told you it was a freak because they don't usually find those 77 mm. or that particular kind of dud on that range, is that correct? A. That is true.

Q. That strafing range was a range which was used by the Air Corps in strafing ground objects, is that right, firing on ground objects?

A. Practicing strafing of personnel. [113]

Q. Is that right? A. I think so.

Q. You know, being employed at air fields, in the Seabees and so forth, you know that they do not fire 75 mm.'s from airplanes, do you not?

(Testimony of John Phillip White.)

A. No, I wouldn't say I knew that. I would say it was my impression that strafing is usually done by light, maneuverable planes that do not carry 77 mm. cannon on them.

Q. They carry 30 and 50 caliber, do they not?

A. A number of them carry 50 caliber. I don't know whether any carry 30 caliber or not.

Q. Will you state what conversation you had with Captain Jones prior to working there?

A. As part of the contract I was required to keep my operations in conformance with any firing schedules that might be—I went to see the captain, to see that my operations would not interfere with any firing. I also, going to see him, wanted to check up on the general impression that I had that artillery projectiles are 95 to 100 per cent iron. On the other hand, I don't know a great deal about—

Q. Are 95 to 100 per cent what? A. Iron.

Q. I am sorry. A. I-r-o-n.

Q. Iron? [114]

A. I don't know a great deal about ammunition. I didn't then, and I wanted to verify the general impression before discarding the possibility of recovering metal from the artillery ranges. So I went to him with the double purpose in mind of making my operations conform to the firing schedule and also finding out what else I could about artillery projectiles. The captain told me that my operations would not interfere with any firing operations. There was no intention of holding any fire prac-

(Testimony of John Phillip White.)

tice either on the strafing ranges or on the machine gun ranges, which I had considered very close to the margin of whether it would be profitable to work them or not profitable to work them, that they were not going to use either of those ranges. Therefore my operations would not interfere with any firing schedule. He also informed me of the possibility of dangerous duds on the artillery ranges, and confirmed my impression that they were primarily iron and therefore of no interest to me.

Q. Did he explain to you the S.O.P., or Standing Operating Procedure, for marking duds?

A. No.

Q. I thought you stated that he did so on direct examination. I may be mistaken.

Mr. Bloom: No, he said Sgt. Hodges.

Mr. Scholz: Oh, Sgt. Hodges did that.

A. Sgt. Hodges explained to me a procedure which he told me [115] had been followed.

Q. (By Mr. Scholz): Now, at that time you knew that duds were dangerous, did you not?

A. Yes.

Q. With regard to your damages, you returned to work on March 24th, 1947?

A. I have heard that, but I do not think it is true. I think it was April 1st when I returned.

Q. 1947? A. Yes.

Q. Have you got a copy of your income tax returns for 1946, 1947, 1948 and 1949?

A. I probably do.

Q. May I have them this afternoon?

(Testimony of John Phillip White.)

A. That is hardly possible, sir.

The Court: What is the purpose? To establish a date?

Mr. Scholz: To establish the earnings.

The Court: To establish the earnings?

Mr. Scholz: Yes.

Mr. Bloom: In previous years?

Mr. Scholz: The accident happened November, 1946, between 1946, 1947, 1948 and 1947.

Mr. Bloom: I submit, your Honor, that there has been plenty of opportunity to subpoena those. I believe it would be an imposition on this man, who lives in Sausalito. I do not [116] know whether he has his copies available. It seems to me rather late in the day to be asking for them.

Mr. Scholz: All I want to do is give the Court information on this.

The Court: What disagreement have you on earnings?

Mr. Bloom: None that I know of.

Mr. Scholz: I do not know what he is earning.

The Court: What is the contention as to earnings?

Mr. Bloom: \$250 a month plus commissions at a later date. As I understand it, the counsel wants to go on a kind of fishing expedition.

Mr. Scholz: No, I do not want to go on a fishing expedition. I want to give the Court information which, if you are successful in recovering a judgment in this case, the Court may use to decide what damages, if any, you have suffered.



(Testimony of John Phillip White.)

The Court: How long was this plaintiff out of employment as a result of this accident?

Mr. Bloom: There were three periods of inactivity, two complete and one partial as testified to and as set forth in the amended complaint, depending upon the periods of time he was in the hospital or immediately thereafter. Of course, the hospital records are in evidence to substantiate the period of complete inactivity.

The Court: What is your contention as to average earnings per month, salary, and commission as to the loss? [117]

Mr. Bloom: In the beginning the testimony shows that the witness was earning only a straight salary of \$250. Later on that was augmented by commission to \$600 or more or \$700 a month.

The Court: The books of the company are available, are they not?

Mr. Bloom: Well, they would be available, I suppose, if counsel wants them.

The Court: Income tax returns, I think—well, do you want the books of the company?

Mr. Scholz: Yes, I would like to take a look at them. If counsel will show them to me outside the court—

The Court: Why can't you do this? During the noon hour you might make an investigation and the books might be shown you with respect to the current earnings of the man during the period he claims he was out of employment, and those books should reflect the facts. There is no use getting income tax returns.

(Testimony of John Phillip White.)

Mr. Bloom: I do not know what the books show, how they were kept or anything, but I am perfectly willing to do what I can to have them brought here.

The Court: All right. It would just be a ledger account, after all, probably two or three ledger sheets, commission sheets.

Mr. Scholz: I have no knowledge at all of his earnings. [118]

Q. Did you say that the projectile that you picked up was a solid iron casting?

A. I don't recall saying I picked up any projectile.

Q. The projectile which exploded, do you say it was a solid iron casting?

A. No, I didn't say anything like that.

Q. Was it the same as the top of your Exhibit No. 4 here?

A. I had a very short inspection of it in Mr. Lang's hand. I am not competent to say whether it was identical with that or not. It appeared to me in his hand to be a solid cast iron projectile. The results showed it obviously was not.

Q. Over in Saipan the Seabees were engaged in clearing land for——

The Court: Pardon me.

Q. That was a little bit unusual, that projectile as you found it? It was not the type of material you would gather? A. Not at all.

Q. It was an unusual type of material?

A. It did not appear to be unusual. It appeared unwanted. It appeared to be the sort of thing, Judge, that the range sergeant had shown me in

(Testimony of John Phillip White.)

his office saying I would find a number of them. But I had not found any, in spite of his telling me I would find a number of them there.

Q. (By Mr. Scholz): Over in Saipan the Seabees were engaged [119] in clearing off land for landing fields, were they not, and clearing off land for utilization by various island units?

A. Yes.

Q. While over there, was there any fighting going on?

A. There was sporadic shooting going on.

Q. Were you engaged among other things in clearing the land, too?      A. Yes.

Q. I hand you herewith, Mr. White, what purports to be a map from the War Department of the Camp Beale reservation, official map, and ask you if you are familiar with that map.

A. I am not familiar with the map.

Q. You never saw it before, I presume?

A. No.

The Court: We will take a recess for a short time. You can familiarize yourself with that.

(Recess.)

Q. (By Mr. Scholz): During the recess, Mr. White, did you look at this map and familiarize yourself with it?

A. I looked at it and I found several familiar ideas. I didn't completely orient myself.

Q. Will you indicate on that map with a little x where the accident took place?

(Testimony of John Phillip White.)

A. That is something that I am not able to do.

Q. Can you locate on that map where any of the ranges are? [120]

A. Here is the rifle range along the road, although farther apart than indicated by the map, it seems to me. Here is the pistol range and the machine gun range.

Q. That is a scale map. You know what a scale map is? A. Yes, I know.

The Court: Where is the range that is the subject of this inquiry?

A. That, your Honor, I do not know. I remember coming out this road, but I forget whether this road—I turned to the left, I turned to the right, to get to the range in question.

The Court: Let us point it out, Mr. Scholz.

Q. (By Mr. Scholz): Can you point out approximately where the accident took place?

A. No. Once I reach this junction I am lost.

Mr. Scholz: I offer this for identification, if your Honor please.

The Court: Mark it for identification, Mr. Clerk.

(The map referred to was thereupon marked Defendant's Exhibit B for identification.)

Q. (By Mr. Scholz): Now, you went on the roads out to the range? A. Yes.

Q. Did you not observe some signs out there, warning signs, approximately 8 feet by 10 feet or even larger, possibly smaller, warning you that they were the firing range and [121] beware of the

(Testimony of John Phillip White.)

duds or words to that effect? A. I did not.

The Court: How large were the signs, Mr. Scholz?

Mr. Scholz: 8 by 10 feet.

Q. You never saw any of those signs at all?

A. I did not.

Q. In clearing the battlefield at Saipan, were you ever warned about duds?

A. I never cleared a battlefield.

Mr. Bloom: If your Honor please, I did not understand there was any testimony that this witness cleared any battlefield.

The Court: The witness has testified that there was sporadic firing on Saipan when he was working as a Seabee, and that was the extent of the testimony.

Mr. Bloom: That was my understanding.

The Court: There is no testimony of any battleground, however.

Mr. Scholz: Well, it was a battleground. I think your Honor will take judicial notice of that.

Q. However, in clearing the ground were you warned of any duds?

A. No, the areas we were clearing had not been actually the areas of fighting.

Q. How do you know that? As a matter of fact, they were fighting all over Saipan, were they [122] not?

A. There was rifle fire all over the island.

Q. Anyway, while you were there were any Seabees injured, become casualties or killed be-

(Testimony of John Phillip White.)

cause of running into duds while clearing the fields?      A. Not while clearing the fields.

Q. Were any of them injured in operating on the ground?

A. Not to the best of my knowledge.

Q. What was your rate in the Air Corps?

A. Private.

Q. What particular training did you have in the Air Corps?      A. None.

Q. What particular qualifications did you have in the Air Corps?

A. I wouldn't say I had any.

Q. Pardon?

A. I wouldn't say I had any particular qualifications for the Air Corps.

Q. Did you do any flying yourself?

A. When?

Q. During the war.      A. No.

Q. Before the war?      A. Some.

Q. When did you see the range officer? Do you remember the date that you saw him? [123]

A. I believe the first day I saw the range officer was the day the contract was awarded.

Q. That was November 18th?

A. I believe so.

Q. At Camp Beale?      A. Yes.

Q. Did you see him afterwards?

A. I don't recall.

Q. You may or may not; you do not recall?

A. I may or may not have.

Mr. Scholz: That is all, your Honor.

(Testimony of John Phillip White.)

Redirect Examination

By Mr. Bloom:

Q. Mr. White, do I understand you to testify that you received no training in the Air Force, is that right? A. That is right.

Q. And you never saw active duty, is that right?

A. That is right.

Q. You have had no artillery training of any kind, did you? A. That is right.

Q. No decontamination of artillery shells or duds, training in that? A. That is right.

Q. Or anything related to it, is that correct?

A. That is true.

Q. Does the same apply to your tour of duty as a Seabee? [124] A. Yes.

Q. Then, in other words, you had no decontamination training as a Seabee? A. No.

Q. Did you have any training in the firing of arms such as artillery?

A. No, my training in firing of arms was limited to a carbine and an M-1.

Q. And you had no training, did you, in the matter of demolition of shells or duds of any kind?

A. No.

Q. I take it that your demolition training as a Seabee was confined to the destruction or removal of structures, is that correct? A. Yes.

Mr. Scholz: That is leading and suggestive.

Mr. Bloom: Well, that is his testimony. I want to clarify it.

(Testimony of John Phillip White.)

Mr. Scholz: It is still leading.

The Court: That was his testimony.

Q. (By Mr. Bloom): So it is a fair statement, is it not, that at no time in your life have you received any instruction from the Government in the matter of handling ammunition such as high explosive shells?      A. That is true. [125]

Q. And you have no experience with high explosive shells of any kind?

A. Not except these ones.

Q. Except this one current. It answers the counsel's question then in the matter of firing of any weapons before the war, what did you have reference to?

A. I do not recall such a question.

Q. Maybe I misunderstood. Did you or did you not testify that you fired some weapon or weapons before the war?

A. I don't recall so testifying. Like everyone else, I shot shotguns and rifles.

Q. That was the only type of weapon you fired before the war?      A. Yes.

Q. And during the war and since what type or kind of firearms, if any, have you fired?

A. Rifles and shotguns.

Q. You have never fired an artillery piece in your life?      A. No.

Q. In reference to the exact manner in which this accident occurred, will you please tell the Court the exact manner in which this accident occurred, what transpired immediately before and at



(Testimony of John Phillip White.)

the time of the accident? In other words, where was Private Lang?

A. Private Lang was quite close to me.

Q. About how far away? [126]

Mr. Scholz: I object to that, if your Honor please. He went over that on direct examination and I went over it on cross-examination.

The Court: I will allow it.

A. I would say when that conversation started, Private Lang was within five or six feet of me.

Q. (By Mr. Bloom): And what transpired?

A. He picked up this item, which I assumed to be a 37 mm., anti-tank. He asked me if I wanted it. I tell him no. There is only a piece of iron with a piece of gilding metal around it, and not enough gilding metal to make it worthwhile.

During the course of the conversation, possibly immediately afterwards, Private Lang reached over to either hand it or toss it to me. We were relatively close together at the moment, and I attempted to catch it as you would anything that is pitched to you or thrown at you, and I dropped it.

Q. The projectile that was in Private Lang's hand, and which was thrown across to you, did it have the appearance to you of one of these solid iron anti-tank projectiles that Sgt. Hodges had previously shown you at the range firing house?

A. It did.

Q. Did you think it was one of those or that type of solid iron projectile?           A. I did.

Mr. Bloom: I think that is all. Thank you. [127]

(Testimony of John Phillip White.)

Recross-Examination

By Mr. Scholz:

Q. Mr. White, you said you thought that was a solid iron projectile, and yet you identified this as being exactly the same type as what you picked up, is that correct?

A. That is not correct, sir.

Mr. Scholz: That is all.

The Court: How far was Lang from you when he threw this?

A. I would say, your Honor, that he was—at the moment he was about as close as you and I are, but he was walking away to start working again.

Q. Did you tell him it was a type of material that you did not want before or after he tossed or passed it to you?

A. I started the conversation while it was still in his hand.

Q. And it was then obvious to you it was not the material you were interested in?

A. It was obvious it was not the material I was interested in.

Q. Did you ask him to throw it or did he do it voluntarily?

A. Eh? He did it of his own volition.

Q. After you told him you were not interested?

A. Yes.

Q. How long would you say you had it in your hand or hands?           A. A second, a half second.

(Testimony of John Phillip White.)

Q. Did you inspect it while in your hands or not?

A. I could only assume I looked at it for the short period of [128] time that it was in my hand, but I did not have a firm grip on it. It was not a matter of making a complete inspection or anything else. I mean I would look at it.

Q. When he threw it or passed it to you, you saw him do that, did you?      A. Oh, yes.

Q. You reached out to catch it?      A. Yes.

Q. How long did you hold it?

A. A second, a half second. I didn't grasp it firmly.

Q. Did you hold it long enough to make an inspection?      A. No, sir.

The Court: I have no further questions. The witness is excused.

### JEAN WHITE

was called as a witness on behalf of the plaintiff, and being first duly sworn, testified as follows:

The Clerk: Please state your name, your address and your occupation, if any, to the Court.

A. Jean White, 4 Third Street, Sausalito.

### Direct Examination

By Mr. Bloom:

Q. Mrs. White, you are the wife of John Phillip White, the plaintiff in this matter, are you not?

A. Yes. [129]

(Testimony of Jean White.)

Q. Will you speak a little louder so we can hear you, please?      A. Yes.

Q. In the year 1946 you made a visit, did you not, with the paintiff to Camp Beale?

A. Yes, I did.

Q. Do you remember approximately the date that you went up there with him?

A. It was about the first of October.

Q. Will you please tell us where you went, to your best recollection, when you got on the reservation?

A. We went past the Administration Buildings, we picked up the sergeant at the range office, I think.

Q. Do you know what his name was?

A. Sgt. Hodges.

Q. You knew he was the range sergeant, did you?      A. I believed so.

Q. Then where did you go?

A. We left our car and we got into the sergeant's jeep and we went out onto the ranges.

Q. Did you in particular, referring to the diagram, Plaintiff's Exhibit No. 11, go out into the area adjacent to the strafing range?

A. Yes, we did.

Q. What time of day approximately was it?

A. It was shortly before lunchtime. [130]

Q. In reference to the target finders indicated on this Exhibit No. 11, would you tell us about how far away you came before your jeep was stopped?

(Testimony of Jean White.)

A. The sergeant drove his jeep right up to where the cartridges were lying on the ground. I believe it was between the finders and the targets.

Q. Somewhere between the targets and the finders, that is, the strafing area proper, is that right?

A. Yes.

Q. Was there any conversation at that time between Mr. White and Sgt. Hodges that you overheard?

A. I remember that Mr. White and the sergeant got out of the jeep and that Mr. White said to the sergeant, approximately, "It is safe here, isn't it?" And the sergeant said that it was.

Q. And then you got out of the jeep?

A. Yes, we walked around on the range then.

Q. How long did you walk around there?

A. Possibly twenty minutes.

Q. And then he returned you in the jeep back to the range office, did he?

A. Yes.

Mr. Bloom: Thank you.

### Cross-Examination

By Mr. Scholz:

Q. I do not suppose, Mrs. White, you could [131] identify what route you took on this map, could you? There is the main barracks over there.

A. No, I am afraid I could not. I know we went out through the gate, but there were several roads, and I don't remember the directions.

Q. You do not remember where on this map you went or where the accident—when you visited

(Testimony of Jean White.)

there October 1st you do not remember where you went, on this map?

A. All I remember is that the strafing range was several miles from the gate.

Q. Going out there, you follow the roads going clear out there?

A. Yes, we left the road to go onto the range, onto the strafing range.

Q. How far off the road did you drive?

A. Well, there was a gravel road and then there was a track where cars had previously gone in the past.

Q. That was unimproved road? A. Yes.

Q. Is that what you were on?

A. Yes, and then we did leave that, too, to go right up onto the range.

Q. Did you leave that in your car, your vehicle?

A. I beg your pardon?

Q. Did you leave the unimproved road in your vehicle? A. Yes. [132]

Q. How far off the unimproved road did you go?

A. Possibly a half a city block. I am not really sure.

Q. As I understand it, isn't the strafing range here, going approximately 15 paces?

A. 15 paces?

Q. Isn't that right?

A. Didn't they say 600 feet?

Q. I don't know. I wasn't there. Between the target firing and the target, was it 600 feet?

(Testimony of Jean White.)

A. I don't know. I am not good at estimating distance.

Q. What is your best estimate?

A. I just don't know.

Q. Would you say as long as this room or longer?      A. I think it is longer.

Q. Pardon?      A. I think it is longer.

Q. Was it twice as long or less or more?

A. I would have to guess.

Q. Roughly?

A. It might be twice as long.

Mr. Scholz: That is all.

Mr. Bloom: I now offer in evidence, if your Honor please, War Department Circular No. 195 under date of June 29, 1945, and under the signature of G. C. Marshall, Chief of Staff, as plaintiff's exhibit next in order. [133]

Mr. Scholz: I will stipulate it is an official copy. In fact, you got it from my file.

The Court: What is the part of that that you desire? You may read any such parts as you wish.

Mr. Bloom: (Reading.)

“Effective until December 29, 1946, unless sooner rescinded or superseded:

“1. Ammunition, general policy. Large areas of land, if and when acquired or leased by the United States for use as maneuvering areas, target ranges, bombing ranges or gunnery ranges and embraces such lands as will eventually be placed in a surplus category by

the War Department and released for civilian use: Any unexploded ammunition or duds which remain on these lands will render them unfit for civilian use unless the areas as neutralized, to remove any possible danger to persons, animals or personal property. It is the obligation of the War Department in the interest of the United States to restore such areas by locating and removing or neutralizing so far as practical, all explosives which remain thereon.

“Responsibility: The examination and policing of maneuver areas, targets, ranges, bombing ranges and impact areas for the removal and/or detonation of duds and other unexploded ammunition is a responsibility of the commanding officer of each installation or the [134] tactical commander having responsibility for the operation of an area for which an installation commander is not otherwise responsible.”

I offer this, if your Honor please, to show the duty—

The Court: Well, that obligation, of course, was slightly different from the obligation that might attach to an invitee under these particular conditions. The Government is charged with ordinary care and this, of course, would apply to areas which ultimately fall into the control of civilians after the uses and purposes of the Government have subsided. It might be relevant. You may argue from it as to the general over-all responsibility.



Mr. Bloom: Yes. I particularly offer it, your Honor, by virtue of the fact that a request for interrogatories which is on file here asking for any and all pertinent government regulations within the knowledge of the officers in question, and this is the only circular to which reference has been made.

The Court: All right, sir.

Mr. Scholz: Your Honor stated our objection.

The Court: Go ahead, Mr. Scholz.

Mr. Scholz: Your Honor has stated our objection to that. I do not think it is material.

The Court: I have stated the general over-all view I would take. I assume it is yours.

Mr. Scholz: That is right. [135]

(The regulations referred to were thereupon received in evidence and marked Plaintiff's Exhibit No. 12.)

Mr. Bloom: If your Honor please, I have shown counsel receipted bills for hospitalization, services of physicians, ambulances and the like.

The Court: I think on that score it might be the subject of a stipulation as to the reasonable value thereof.

Mr. Bloom: Yes, counsel is willing to do so. However, he raises the question that there is a carrier involved here and I represent the carrier, and I told counsel that I would file a lien for this amount, and I ask leave and permission of your Honor to prepare such a claim of lien and ask counsel if he will stipulate then that these expenses

in total sum of \$3,167.09 were incurred by way of hospitalization, ambulances, nursing charges and the like, and that they are the reasonable value thereof.

Mr. Scholz: If your Honor please, here is the situation: I do not dispute the bills here, but I think it is my duty to advise the Court of the law. These were paid out under the Workmen's Compensation Act by the Compensation Insurance Company. Therefore I do not see how your Honor can consider that——

The Court: He proceeds under the doctrine of subrogation, isn't that correct?

Mr. Bloom: Yes. If your Honor please, there are a number [136] of cases—I did not think this point would be raised for the reason that there are a number of cases in other jurisdictions where the allowance has been made for the carrier's expenditures, and then on the judgment it is segregated so much for the expenses of the carrier to be impressed with trust on behalf of the carrier, so much for attorney's fees, if any, and the balance for the judgment for the plaintiff, without any formal intervention or claim of lien. However, if a claim of lien is desired or asked for, or if your Honor thinks it is desirable, I will file such a claim.

Mr. Scholz: Your Honor will appreciate I have no objection to it. The only thing I do think it is my duty to advise your Honor of the law as the United States Attorney's office sees it. Outside of that, we do not care, but from my experience in

these cases before other courts here, they have always rejected that and made them file suit. I had one before Judge Roche, and I stipulated with the insurance company the same as we are asked to do here, the same situation—not the same type of tort case, however—and the insurance company filed the suit. I stipulated that the Government would be bound and they would be bound by whatever judgment was made in that main suit, and we stipulated to the cost, and so forth. I think that is what they have to do. I do not think the court can award a judgment to Mr. White because he has not paid these bills, and the Government can pay only money to the person actually [137] entitled to it. I do not care, but I do not want to see either counsel go wrong or the court go wrong.

Mr. Bloom: If your Honor please, I have in the courtroom at the present time a citation to several cases where the procedure that I outline was done. It is true sometimes it is done by a separate suit by way of subrogation. Sometimes it is done by way of intervention, and it has been held by our courts, including the Supreme Court of the United States, that that is a proper way of proceeding.

The Court: There isn't any question of intervention or interpleader as the proper mode?

Mr. Bloom: Yes.

The Court: But that was not done in this case.

Mr. Bloom: That was not done in this case and I do not think it is necessary. All these cases have held that. The Federal Rules—I think it is Rule 17—says the real party in interest has to bring the

suit. These cases have held that that does not forbid the Court in an action of this type of award the damages that have been segregated and impressing them with a trust on behalf of the carrier or whoever has expended the money to prevent multiplicity of actions and the like. So with your Honor's permission, I will, however, file a claim of lien as is frequently done in the State Courts.

The Court: Yes, you may do so.

Mr. Bloom: Thank you, your Honor. And then, counsel, do [138] I understand that you will then stipulate—

Mr. Scholz: Here is what I will stipulate to: that the Industrial Indemnity Exchange had paid \$2,038.84.

Mr. Bloom: Yes.

Mr. Scholz: I understand you checked it up yourself and you found you had given me the wrong figure.

Mr. Bloom: That is correct.

The Court: That is for hospitalization and medical?

Mr. Scholz: That is for hospitalization—hospitalization, \$1869.22; physician and surgeon service \$877.17; ambulance, X-rays and other costs, \$245.

The Court: Did the petitioner or plaintiff here receive compensation?

Mr. Bloom: Yes, of course, he received, I think, a thousand dollars or approximately that.

The Court: Did he receive a permanent rating of disability?

Mr. Bloom: No, your Honor, no permanent rat-

ing. That is, it was never asked for. He received by way of compensation \$1,271.45.

The Court: Had the time or the period elapsed wherein the plaintiff might apply for permanent rating under Workmen's Compensation?

Mr. Bloom: No.

The Court: The time is open? [139]

Mr. Bloom: The time is open, yes.

The Court: In the light of Dr. Morrissey's testimony, the man is suffering a permanent disability. It might or might not be provident, in the light of what eventuates in this court, to make application. How long is your time open?

Mr. Bloom: I understand it is five years.

The Court: There is no question this man has suffered a severe injury to his foot. That ulcerous condition is one I am familiar with, and Dr. Morrissey's testimony is clear on the subject. He has a permanent disability. There is no question about that. You do not deny that.

Mr. Scholz: I am not, your Honor.

The Court: As to the permanent character of this disability.

Mr. Scholz: If your Honor please, I have known Dr. Morrissey very intimately for many years, and I have had him on my side of the fence and on the other side, and I am willing to take his testimony.

The Court: I am willing to take his testimony. I have had him in many cases. I know Dr. Morrissey's testimony is pretty accurate. Of course, we are all subject to the frailties of human nature, but Dr. Morrissey is an able man, and when he testifies

this plaintiff is suffering, I am willing to take it in the absence of some very serious conflicting testimony.

All right. You may proceed. [140]

Mr. Scholz: I will stipulate that the Industrial Indemnity Exchange paid John Phillip White 12—

Mr. Bloom: That is no part of the case, the temporary disability payment.

Mr. Scholz: Yes, it is.

The Court: Pardon me, counsel. I was distracted.

Mr. Bloom: Your Honor asked me about the temporary disability payments and I advised you what had been done. That, of course, has no part in this case, and we can not recover for temporary disability payments on behalf of the carrier or anybody else.

Mr. Scholz: But I think the Court ought to be advised how much temporary disability he has received.

Mr. Bloom: He has been so advised.

Mr. Scholz: Do you want me to stipulate that the Industrial Indemnity Exchange paid out \$3,000—

Mr. Bloom: \$3,167.09.

Mr. Scholz: Have you checked that yourself, personally?

Mr. Bloom: Yes.

Mr. Scholz: I will take your word for it. So stipulated.

The Court: So stipulated.

Mr. Bloom: Thank you. And that they were reasonable in amount.

Mr. Scholz: Yes.

The Court: And were incurred, and that is the reasonable [141]

Mr. Scholz: Reasonably incurred.

The Court: So stipulated. That completes the plaintiff's case?

Mr. Bloom: With one exception, your Honor. There is on file in the action an order for the production of certain documents ordered by his Honor, Judge Roche.

The Court: Yes, I glanced at that order.

Mr. Bloom: In response to that order, counsel has provided me with two of the nine items in question. Now I would like to ask him again at this time if he is able to produce the balance of these records, and if not, would he please explain his inability.

The Court: Were the decontamination records produced?

Mr. Bloom: No, your Honor.

The Court: Would they be material?

Mr. Bloom: Yes, I think they would.

The Court: They would show what efforts were made to decontaminate the area in question?

Mr. Bloom: Yes.

The Court: You may, however, get that on your examination of Captain Jones. He will take the stand. Do you have those records, Mr. Scholz, the decontamination records?

Mr. Scholz: I gave him a copy of the records.

The Court: I think material also would be the range firing records showing the periods of time. [142]

Mr. Scholz: We haven't got that. You see, your Honor, I endeavored to get those, although I did not think it was our particular responsibility. Camp Beale is closed up, and all these records went back to the depository at St. Louis, Missouri. We asked for these records, and I have a memorandum to the range officer, covering the period of November and December, 1946, of which I have given you copies, I believe, but the firing on the range, we have no records of that outside of what is in the testimony of Captain Jones.

The Court: Let us see what eventuates on the examination of Captain Jones. However, you desire them in advance of that?

Mr. Bloom: Yes, we feel, and I think rightly so, that we have been seriously prejudiced in the preparation of the case for trial, and as a matter of fact, since this information is in the sole custody of the Army, we feel we do not want to be penalized.

The Court: Counsel, I will grant you a continuance so those records will be produced.

Mr. Scholz: How can we produce records when we do not have them? I know what the situation is. I happened to be in the Army. I had a replacement depot before I went overseas. We closed it up and sent all our records back to St. Louis. Those are the only pertinent records.

The Court: Captain Jones, will you take the stand, [143] please? You might examine him on this subject.



ROBERT S. JONES

was called as a witness on behalf of the Court, and being first duly sworn, testified as follows:

The Court: Mr. Bloom, you might examine Captain Jones preliminarily here with respect to the order made by his Honor, Judge Roche, on October 11th, ordering the production of certain documents. If those records are not available, all well and good. If they are available in some other depot or source, then I will allow a reasonable time to get production if they be deemed to be necessary for your case.

The Clerk: Please state your name, rank and your official capacity to the Court.

A. Robert Sumner Jones, Captain, United States Air Force, Reserve. My present organization is the 28th Strategic Reconnaissance Wing, Heavy, Rapid City Air Force Base, Weaver, South Dakota. Do you wish my serial number, sir?

Direct Examination

By Mr. Bloom:

Q. Captain Jones, in November, 1946, would you please tell us where you were stationed?

A. Yes. I was stationed at Camp Beale, California.

Q. What was your rank at that time?

A. I was a captain.

Q. What was your position in the service at that reservation? [144]

A. At that time I held an A.U.S. commission in the infantry as captain. I was detailed for duty with the Air Corps. I was at that time under orders assigning me to special staff duty with the Ninth

(Testimony of Robert S. Jones.)

Service Command at Camp Beale. My primary position or duty was as post operations officer. However, I had many additional duties.

Q. Did you have anything to do with the operation or control of the firing ranges?

A. Yes, an additional duty I had was as post range officer.

Q. How long did you occupy that position of post range officer, by the way?

A. I believe I was assigned that additional duty about July, 1946, and I terminated all of my duties shortly before we closed the installation, after I had closed my affairs in each particular duty. I was relieved on competent orders from that responsibility. I believe it was about June, 1947. You must appreciate the fact that my profession is governed by many, many, many written orders.

Q. So I understand.

A. And it is very difficult for me to place these dates accurately without my own records, which I do have, however.

Q. As post range officer you had under your custody and control various records pertaining to the firing ranges, did you not?

A. Yes, I had all existing records in the range office at the [145] time I assumed that position under my custody.

Q. His Honor, Judge Roche, in this particular case, has ordered the production of the decontamination records of the United States Army for firing ranges 9 and 10 B and the strafing range adjacent thereto at Camp Beale, California, for the period

(Testimony of Robert S. Jones.)

January 1, 1944, to and including November 22nd, 1946. I am going to ask you whether decontamination records were kept of those ranges during that period.

A. With the Court's permission, that would entail a rather lengthy explanation to adequately explain to you the standard operating procedures employed in conducting the de-dudding procedures, and if you are willing, I shall.

The Court: Go ahead.

The Witness: My records did not contain any record of firing to speak of, for the simple reason that as the various organizations would fire upon the ranges, and conclude their firing, these records would be kept for a predetermined length of time and then destroyed.

The Court: As to accuracy, firing power and the like?

A. Yes, number of rounds fired, the organization date——

Q. That would affect inventory, supplies, and so on, criteria of conduct of personnel and the like?

A. Yes. It must be understood that Camp Beale was in all probability one of the largest ranges we had on the West Coast, with perhaps the exception of Fort Ord. It was a personnel [146] replacement depot and they did train mechanized divisions there. So they had firing from all phases of small infantry weapons, flat trajectory weapons up to the heavy caliber weapons, 75, 155, 105 millimeter mortars—all the weapons employed by the infantry.

(Testimony of Robert S. Jones.)

Q. (By Mr. Bloom): May I interject and ask this question?      A. Certainly.

Q. If the particular firing records of these ranges were only kept for a short period of time, it is true, is it not, that records were kept and maintained as to what type of firing was done on what ranges in general terminology?

A. Yes. From time to time the range officer was required to inform his commanding general the types—other information regarding the firing that had been conducted on his ranges over a specific period of time.

Q. And such records, I assume, were maintained for the period in question at Camp Beale, California, were they not?

A. Yes. Let me further explain, however, Camp Beale was comprised of two separate functioning cantonments—three actually. The cantonment of which I was a part was the actual command administrative function. We referred to it as Main Post, where the headquarters existed.

We had a second cantonment, which was the personnel replacement depot concerned with the training, replacement of individuals or units; and the third was a mechanized division, [147] which was usually a complete unit, organically and technically, but, of course, they maintained their own records of firing and supplied everything. We simply kept house for them, so to say, and I never did have copies of their range officers' records. Actually, I was over-all responsible, or the range officer at that

(Testimony of Robert S. Jones.)

time was responsible primarily for the coordination of the firing of various units and also for the maintenance of the ranges.

Q. But you do know such records were kept?

A. Yes. However, at this point I would like to suggest that at such time as we close Camp Beale I as post operations officer received a directive pertaining to the records that I would send for permanent storage. Other records not pertinent or in my opinion, not pertinent, were destroyed at my direction.

Q. Well, now, going back to the decontamination records, they were not destroyed, were they?

A. Let me pick up the vein again. As units would fire, it was the officer in charge of the range or firing, that is, an officer provided by the tactical unit conducting the firing, who was responsible through the Department of Observers, to observe any dud—I believe it is understood now that the terminology of a dud is a projectile, explosive type, that failed to detonate on impact. He would record the approximate location of these projectiles and immediately upon the cessation [148] of firing he would send crews out with their sketches and they would attempt to locate—at least the impact area—mark them, and get their proper demolition people in to destroy them, efforts being made at all times to reduce the number of duds to a minimum. That was the usual procedure in the disposition of duds. However, at such time as firing ceased on the ranges at the end of hostilities, our mission changed. The

(Testimony of Robert S. Jones.)

commanding general through his designated representative requested the range officer to submit a report to him as to the status of the ranges, with particular reference to the de-dudding that had been accomplished.

Now, counsel has a copy of that particular report. At such time as I was informed by the commanding general of the decision from Washington that we were to declare Camp Beale as surplus, I was requested to make my own survey records; also, if necessary, a physical survey of the ranges, and inform him of the status, and that I did, including a physical survey.

It is unfortunate, but copies of the map that I submitted with my report were not forwarded apparently with this other material, but I did contain the former range officer's report with my own simply to justify my remark to the engineer that the provisions of such and such a circular had been complied with.

Q. Then I take it you know that there are these records in existence? [149]

A. I do not know. It would be my opinion, because the actual records that counsel has were appended to a formal investigation that was made, coordinated through my office, to determine causes, and so forth, of the alleged accident, and I did submit at that time information to the investigating officer where he could obtain such records. It is possible, if we do not or have not been able to get them from St. Louis, the district engineer might

(Testimony of Robert S. Jones.)

possibly have a copy of my report, the original that had the actual map showing the number of times each area had been de-dudded or surveyed.

Q. What did you tell the investigating officer as to where these records could be obtained, Captain?

A. Well, he knew at the time because we had various staff meetings to discuss our progress in preparing the camp for surplus, and each of we staff officers would review for the general's benefit primarily the activities we had accomplished. We knew that my records—my report had been submitted to the district engineer because naturally that was the most important concern of my own at the time.

Mr. Bloom: Would your Honor care to take a recess at this time?

The Court: Have you satisfied yourself, counsel, that you desire additional records, or do you feel the examination of the captain would suffice?

Mr. Bloom: I think, with your Honor's permission, we might [150] see what can be developed.

The Court: You might reserve your request on that.

Mr. Bloom: Yes, if I may.

The Court: We will take up then, at 2:30.

(Thereupon an adjournment was taken to 2:30 o'clock p.m.) [151]

Afternoon Session, 2:30 P.M.

Mr. Scholz: If your Honor please, during the noon hour Mr. Bloom handed me statements which he stated is the withholding statement of John Phillip White, is that correct?

Mr. Bloom: Yes.

Mr. Scholz: And the withholding statement of the wages paid John Phillip White for 1947; the total wages was \$2,334.23, and for 1946 it was \$297.14.

The Court: That represents the loss or alleged loss?

Mr. Scholz: That is the total wages paid in 1947-1946. When did he start working for them, do you know?

Mr. Bloom: In 1946 in the month of July.

That is the wrong figure.

Mr. Scholz: I was looking at the wrong employee. Correct that, Mr. Reporter. In 1946 it was \$907.50; in 1947 it was \$2,334.23. In 1948 he hands me a statement which I assume is taken from the books of the Mars Metal Company which shows the total earnings of \$4,661.42, and then there is also a paper represented to me as being taken from the books of the Mars Metal Company for four months in 1949. That is when he left and became self-employed. \$416.45.

Have you submitted your case?

Mr. Bloom: Yes.

Mr. Scholz: If your Honor please, at this time I would [152] like to make a motion for non-suit. Knowing your Honor pretty well, I haven't too



much expectations it will be granted. However, the motion for non-suit is based upon the following: first, the duty to a licensee is not to wilfully or wantonly injure him.

The Court: An invitee?

Mr. Scholz: Yes. Secondly, the proximate cause of the injury or the negligence, the proximate cause of the negligence was the negligence of his own employee.

Three, under his story as told on the stand or under the sworn statement of his own negligence here, there is contributory negligence.

A third point is that he had been under contract to go over to the strafing range, and he knew there was a range which was used, and he is an experienced man. He knew that there would be duds on the place. He not only knew there were duds on the place, but he saw some, I think, but he found one and marked it himself. As a matter of fact, he testified he marked under the sergeant's direction or someone in the armed personnel. He is a man approximately 35, 34 years at the time; had military training, and knew the consequences of going on the range. He had been warned to stay away from duds. In fact, one dud had been pointed out to him. I could add a great deal more to that, your Honor, but I think that briefly is the motion. Your Honor is familiar with the testimony here. [153] We submit our motion, on those grounds.

The Court: I will deny the motion at this time.

Mr. Scholz: Captain Jones, will you take the stand?

## ROBERT S. JONES

was called as a witness on behalf of the defendant, and having been previously duly sworn, testified as follows:

The Clerk: You have heretofore been sworn and you are still under oath.

The Court: You might bring us right down to the events of the day in question or immediately prior thereto, because the captain has already qualified himself. He has stated his background and he has already stated in one form or another for the record his duties generally. So you might bring us right down to the events.

## Direct Examination

By Mr. Scholz:

Q. Captain Jones, you were the operation officer and the post range officer at Camp Beale, California, in the month of November, 1946? A. I was.

Q. In such duty did you meet Mr. White, the plaintiff in this action? A. I did.

Q. Will you state to the Court the circumstances?

A. Yes, sir. I believe it was approximately the month of [154] September of that year when Mr. White was introduced to me as a representative of the Mars Metal Company. He disclosed to me a letter prepared by headquarters, Sixth Army, addressed to me simply as Operations Officer, as I recall, advising me of his business at the installation. He was basically to survey the ranges with

(Testimony of Robert S. Jones.)

the thought of making bid for the procurement of the non-ferrous metals existing thereon.

Also in the letter were instructions to me to afford him assistance in finding these areas and giving him such other courtesies as he required.

At that time I did not have the time myself to go out on the ranges with him and I designated my range sergeant as my representative.

Q. When and where was this conversation held?

A. This conversation was held in the headquarters of Camp Beale, in the post operations office.

Q. About when was this? You say in September, 1946?

A. I believe it was approximately September.

Q. What was said and what was done in that conversation with Mr. White?

A. Well, naturally Mr. White queried me for my opinion as to the most profitable ranges for his type of enterprise. He had explained to me rather clearly what he was interested in. That was at that time during that conversation about the gist of the important matter we discussed, other than my offer to [155] give him every assistance and make those arrangements.

Q. Did you have another conversation with him?

A. Yes, I did.

Q. When and where was that conversation?

A. It was on or about the 18th of November, at which time Mr. White entered my office, showed me the contract that had been awarded to him, and we discussed his plan of operation at that time. He

(Testimony of Robert S. Jones.)

told me he would like to begin operations immediately.

Would you care to have me go into detail as best I remember the conversation?

Q. That is right.

A. He asked me at the time whether or not he could use military personnel. I explained to him that he could not employ military personnel or equipment. In fact, it was my responsibility to further explain that he could in no way deface the ranges. If he did, he would be expected to restore them. I went through the usual explanation to him of his obligations to the service in that respect.

Q. Did he ask you anything about where he could obtain this assistance or help?

A. Yes, he did.

Q. At that time?

A. Yes, sir. He asked me if I could recommend a source where he might obtain labor, and I suggested the Farm Labor Bureau, [156] or whatever it was. I have forgotten the nomenclature. Or I suggested that he perhaps see Mr. Shingle, who was president of the Chamber of Commerce in Marysville, that he was very cooperative and perhaps could help him along those lines.

I asked him if he had equipment and trucks and he assured me he did.

And at that time I believe it was his stated intention to go in and see these agencies in order to procure the labor necessary.

I also explained to Mr. White at the time that it

(Testimony of Robert S. Jones.)

was my responsibility to advise him these ranges in all probability had contained unexploded missiles, that I had just completed a survey of the ranges personally and had arrived at that conclusion, and that we had a directive which all people on the ranges must follow.

And Mr. White at that time assured me that he was familiar with the practices, that is, the conduct, his conduct, proper conduct around ranges or around such duds; that he had been in the Seabees, and I believe he said he was familiar to a certain extent with, well, in the army term, demolition, referring chiefly to the demolishing of such projectiles.

However, I insisted that I must go through with my obligation and did explain to him that he was not to approach a dud or questionable missile within a safe range. I don't know—later I did publish, or earlier I published a distance [157] of five feet. Whether or not I told Mr. White that that distance was five feet, I don't recall. However, I requested that he mark the dud with warning flags that we would make available to him or pile stones near it, or some other marking that would be easily discernible, make a notation, mental or otherwise, of its location, and then inform myself or the provost marshal or Sgt. Hodges, my representative, immediately so that we could get the necessary demolition squads there to destroy the dud.

Earlier in the conversation I asked for Sgt. Hodges, had my secretary call the range house or range office and have him report to me. I do not re-

(Testimony of Robert S. Jones.)

call exactly at what phase of the conversation he came into the office, but when he did arrive I instructed him to take Mr. White to the areas he was interested in and assist him as best he could within the provisions of the Government, and reminded the sergeant that we could not employ our military personnel or equipment in order to assist him in his mission.

Q. In regard to those ranges and possibly duds, did you take any steps to warn the general public or any person of their presence? A. Yes, sir.

Q. What steps did you take?

A. Well, it was October, I believe, I called Mr. Shingle, the president of the Chamber of Commerce of Marysville, and told [158] him that as a result of a dud survey that I had personally conducted on the ranges, I had decided that it was dangerous to the public and asked him for his suggestions or recommendations as to what measures we could take to notify the public. Mr. Shingle suggested that we run an article in the Appeal Democrat newspaper of Marysville, which has the largest circulation, and simply describe to the public the conditions, and warn them, and also advise them that if they did have occasion to be out there, what operating procedure to follow in the event they discovered a questionable missile.

Also Mr. Shingle recommended that whereas we had leased parts of the ranges to the Cattlemen's Association, that I prepare memoranda to the cattlemen containing much the same as this newspaper

(Testimony of Robert S. Jones.)

article, which I did, and in view of the difficulty of my contacting the president of the Cattlemen's Association, being that he was out in the range most of the time, Mr. Shingle volunteered to act as my go-between and deliver the memoranda to him, which to my knowledge was accomplished.

Q. Captain, I hand you herewith Defendant's Exhibit B for identification and ask you, that is a War Department map, isn't it?

A. Yes, sir.

Q. And that is the area of the Camp Beale reservation, is that correct, at that time?

A. Yes, sir, that is. [159]

Q. What is this area lined in red?

A. The area with the red hachure represents an area de-dudded previously—well, as reported, I should say, in a report of 1944. You have that, I believe, in your records.

Q. Referring to report dated the 17th of October, 1944?

A. Yes, sir. This was prepared by Lt. Chipman, and the map was prepared evidently by the same officer and appended to this report.

Q. Is that all partly cultivated, is it grazing, or what? I am referring now to the time of the accident.

A. There was no cultivation on the land. The land was being used for grazing purposes. That was in October, 1946—portions of it.

Q. None of it was under cultivation?

(Testimony of Robert S. Jones.)

A. No, sir. Parts had been. They were small truck farms, a few; but, of course, they had not been touched since the Army had leased this property.

Q. Since the Army took it over during the war?

A. Yes, sir.

Mr. Scholz: I guess we had better mark this for identification, too, your Honor.

(The document referred to was thereupon marked Defendant's Exhibit C for identification.)

Q. (By Mr. Scholz): Were there any warning signs in that area, in the firing range area, warning the public? [160]

A. Yes, sir. At the approaches to the range area, that is, the main traveled approaches, other than trains, I would say—

Q. Would you mean crossroads or intersections or road junctions?

A. Not necessarily, but normally they all occur at road junctions, but signs were placed strategically at the chief entrances into the range area, large signs. I imagine they were about 8 by 10 feet, made out of heavy timber, permanent nature. As I recall, they had large red lettering, "Warning. Firing or Artillery Ranges—", something to that effect, advising the public to remain on the traveled portions of the road, not to leave the traveled portions of the road, and not to disturb any projectiles, to that effect. I don't remember the exact warning.



(Testimony of Robert S. Jones.)

Q. Could any person driving along those roads pass by without seeing those signs if they were looking?

Mr. Bloom: That calls for an opinion and conclusion of the witness.

The Court: Sustained.

Q. (By Mr. Scholz): Go ahead, Captain. Did I interrupt?

A. No, I was simply going to say we had not covered the small trails, for which there were a number entering, but the public didn't expect—we didn't expect them to use them. We covered the gravel and the permanent road leading in only. I can point out the location of three of them that I remember very well. [161]

Q. Where are those locations? Will you mark those with a little x?

A. I am not sure (indicating on diagram).

Q. That is the approximate location?

A. Those are approximate, yes. I remember that occasion quite well because as a result of our survey we discussed, as I indicated previously, the possibility of taking whatever measures were necessary to safeguard the public, and at that time the Executive Council took the matter under consideration and discussed with the engineer the proposition of making additional smaller signs and putting them at the trail entrances. However, they did modify the present system somewhat. They did not attempt to cover the trails, however, but at stages throughout the reservation—I mean throughout the

(Testimony of Robert S. Jones.)

range area—they would in those areas where we had found deposits of duds or the greatest impact areas, we would occasionally—the engineer would occasionally put a smaller sign.

Q. Speaking of those large signs, what type of lettering was there on there? I mean as to color and size.

A. As a recall, the signs closest to the area in question, it seems to me the word “Warning” was in red—I would say letters approximating a foot in height—and I believe the rest of the sign was in black. That is the best of my recollection. I passed that any number of times, but I didn’t observe it in detail after the first examination. [162]

Q. Captain, will you mark on this map the approximate location of the area where this strafing range was located?

A. This, I might point out, is a map prepared by the engineers and it does not have the detail of the sketches that we use in our range work. But to the best of my recollection, it was in that approximate area.

Q. This is a small map. One inch on the map represents 62,500 inches on the ground.

A. Yes, sir.

Q. That is about a mile, roughly?

A. Right. There is a scale here on the map approximating an inch. The maps we used were over a yard—four or five feet in width.

Q. One to 5,000?

A. Yes, very small scale.

(Testimony of Robert S. Jones.)

Q. It was general knowledge that was all used as ranges out there, was it not?

Mr. Bloom: I did not understand the question.

Q. (By Mr. Scholz): It is a matter of general knowledge that those were used as ranges out there?

Mr. Bloom: I will object to that on the ground it calls for the opinion and conclusion of the witness, what was general knowledge.

The Court: Yes.

Mr. Scholz: On a matter of general knowledge, I think you [163] can call for a conclusion.

The Court: The objection is sustained.

Q. (By Mr. Scholz): Captain, any duds that the Army knew about were marked, were they?

A. Yes, sir. I had prepared a directive on that as operations officer. As operations officer, I was responsible for the supervision over the range officer and as such, I put a directive out to the effect that anyone, regardless of capacity or authority to be on the ranges, that discovered a questionable missile would not approach that missile within five feet. They would mark it so that it could easily be identified, preferably seen from the approach, roadway. They would then make a notation of its location and immediately report it to myself or to the provost marshal.

Mr. Bloom: If your Honor please, I now make a motion to strike the last question on the ground that the directive itself would be the best evidence, and on the further ground that there is an order to pro-

(Testimony of Robert S. Jones.)

duce documents respecting the directive included and the same has not been produced.

Mr. Scholz: If your Honor please, we haven't got that. I will read into the record here a letter which I received from the Attorney General.

The Court: Show it to counsel.

Mr. Scholz: Enclosed is a copy from the Assistant Judge Advocate General. He said that a thorough search of the [164] records of Camp Beale at the Kansas City Record Center, Kansas City, Missouri, had been made, and it failed to disclose any record of treatment, report of injury or investigation pertaining to the injury of the plaintiff in this case, nor do the retained records at Camp Beale on file at that area depot. We have done all we could. I have written back there several times and it is obvious. There were ten million people in the Army during the war, and there are tons and tons of records that go by there, and we do not know where it is. I think I can testify to that.

Mr. Bloom: The purport of that letter, as I understand, is there is no such document in question. Search has been made and there has none been found. If it is not in existence, I do not see how testimony can be made with respect to it.

Mr. Scholz: It said, "Thorough search fails to disclose any records of these."

Mr. Bloom: I believe the cases hold, if your Honor please, on these motions to produce that the Government and the Army in particular, is in the same position as a private litigant in so far as the

(Testimony of Robert S. Jones.)

production of records is concerned, and this is particularly true in a case of this kind where the injured party is more or less dependent upon information solely in the custody and possession of the Government and the Army.

The Court: While it is true the United States Government [165] is a private litigant ordinarily, we have in mind also that in a wartime program the records are very voluminous, even beyond the scope of the imagination of a person. The records were not microfilmed or anything of that nature.

The Witness: Not records of that nature, no, sir.

The Court: They would not be retained in the War Department because that would not reflect statistical information on the personnel.

Mr. Bloom: Yes. I would like to make one inquiry. It was my belief that whenever an accident of this kind occurred on a military installation there was an immediate inquiry by a board of inquiry, and that any pertinent documents were taken out.

The Court: Ask the captain on that score whether a board was convened and a finding made.

Mr. Bloom: Yes. Does your Honor wish me to interrogate him?

The Court: You might ask him.

Q. (By Mr. Bloom): Was such an investigation made, Captain? A. Yes.

Q. And wasn't an investigative file assembled?

A. Yes, it was.

(Testimony of Robert S. Jones.)

Q. And weren't these records made a part of that investigative file?

A. Well, I think I know the information that you wish, and I think I can explain to your satisfaction what records may [166] exist at this time. I personally either destroyed or supervised the disposition of all of the range records and the operations records. There is one record that may be instrumental to the case and that is the report that I personally submitted at the request of the chief of engineers prior to the disposition or, you might say, upon the declaration of Camp Beale as a surplus installation. This dud survey I mentioned I made in conjunction with this report, and I appended to my report not only copies of the report entered—I believe it has been accepted as evidence—but also my own maps designating the areas that had been de-dudded, the number of times they had been de-dudded and so forth, and the approximate number of duds remaining at each place. That report we tendered to the chief engineers and of course what disposition has been made of it since I do not know.

Q. It became a part, did it not, the originals or copies thereof, of the investigative file of this case?

Mr. Scholz: I will say this. I have the report of the investigation here which I was going to offer in evidence.

The Witness: The report of investigation we did—I recommended, and it was concurred upon that we should make formal investigation of the incident, in view of the fact that a military man had

(Testimony of Robert S. Jones.)

been injured, and that the injury had taken place on a military establishment. Therefore the investigating officer—I believe it was Captain [167] Sullivan—instigated a formal investigation, at which time he obtained these sworn statements of myself and these other people concerned.

Q. My question is, are the records which you alluded to or copies thereof a part of that investigative file?

A. I don't remember. The Captain, Captain Sullivan, did show me the final prepared investigation, which I reviewed, more for my own information than my official capacity, but I do not recollect that he had reports of de-dudding in that. He may have.

Q. I take it, your testimony is you do know that those records, including this de-dudding rendered, were forwarded to the chief engineers, but you do not know what happened to it thereafter, is that correct?

A. Well, the report pertaining to the de-dudding operations, yes, that report did go to the chief engineers. The report of investigation following the accident, I do not know whether that went in or not. I do not believe any action was taken based upon the investigation. The report may have gone to headquarters, Sixth Army. It was not in my prerogative.

Q. But you examined the investigative file?

A. Yes, sir.

(Testimony of Robert S. Jones.)

Q. Your testimony is you do not remember what records were in it?

A. No, my testimony is to this extent, that I do not recall what de-dudding reports or range operational reports may have [168] been contained in it.

Q. Do you remember whether any de-dudding or decontamination reports were contained in that investigative file?

Mr. Scholz: I submit, your Honor, the best evidence is the investigating report itself, which I have here, less the affidavit, which I offered in evidence this morning.

The Court: The report may be marked for identification at this time. Counsel may look at it.

Mr. Bloom: Thank you, your Honor. My motion was predicated on the fact that perhaps this report would or should contain the reports in question.

The Witness: I might point out that my interest in reviewing that was simply to review the testimony given by the parties concerned. As I say, officially, it was not my prerogative, for that matter, to review the report. It was out of my hands.

(The document referred to was thereupon marked Defendant's Exhibit B for identification.)

Mr. Bloom: I understand your Honor will reserve your ruling?

The Court: Yes, I will give you an opportunity, not only to peruse the record but to make inquiry



(Testimony of Robert S. Jones)

on the subject of further records based upon what you may observe. Counsel, Mr. Scholz, may I address myself to you on the question of time? The captain here has to return to his present base [169] on the East Coast?

The Witness: South Dakota.

The Court: South Dakota. Do you think you can complete with the captain today?

Mr. Bloom: I should imagine so.

Mr. Scholz: I think so. The chief part of his testimony is in now. The other would be small things.

The Court: Do you have extended cross-examination?

Mr. Bloom: I do not anticipate so, your Honor. Do I understand the captain is your only witness?

Mr. Scholz: Yes. I told you we tried to get hold of Private Lang and could not locate him.

The Court: Where is the sergeant?

Mr. Scholz: The sergeant left the army and the last I heard of him, your Honor—if there is any question about that, we may take his deposition—the last I heard of him, he is somewheres in Texas. He is out of the Army.

The Court: Have you located his whereabouts?

Mr. Scholz: I have his address, but I do not know whether he is there.

Mr. Bloom: Your Honor, a long time ago—as a matter of fact, years ago—I tried to locate these men to take their deposition and they could not be located at that time.

Mr. Scholz: I wrote you a letter——

(Testimony of Robert S. Jones.)

The Court: The sergeant is an important witness or would [170] be.

Mr. Bloom: We finally located him in Texas. We have an address. I do not know whether he is there yet or not. Captain Petrie we located in Sacramento. I served a subpoena on him and the return of the United States Marshal states that the deputy marshal endeavored to locate Charles E. Petrie, 6660 35th Avenue, Sacramento, California, and was advised May 29, 1950, that Mr. Petrie had left a forwarding address in Washington. That was after we served the subpoena for the trial. We traced him to Los Angeles, we traced him to Philadelphia, and then we lost him. I associated Philadelphia counsel to take his deposition, your Honor, and he could not locate him. In other words, I think I made more than the ordinary effort to locate all these men to have them testify.

The Court: Have you availed yourself of the FBI in this connection?

Mr. Scholz: No, because we do not do that.

The Court: That service is available to you in these cases?

Mr. Scholz: Not unless we have exhausted—the FBI has certain duties, your Honor. When it is service connected like this, in a branch of the armed forces, they are supposed to do the investigating themselves. The FBI is not supposed to locate all these things. The Army has a method of locating through their files. [171]

(Testimony of Robert S. Jones.)

The Court: I mean as to individual witnesses and the interviewing of witnesses.

Mr. Scholz: We always go through the Army.

The Court: In tort liability cases I thought the United States Army had available the services of the FBI.

Mr. Scholz: They have under certain circumstances, depending on the amount and depending on whether or not they have exhausted these facilities they have.

The Court: You haven't any facilities available, so that would not be much to exhaust. You haven't any investigators.

Mr. Scholz: Not a single one.

The Court: That begs the question.

Mr. Scholz: No, I always make arrangements with the Army. On this last case we tried, we went through the Army. They go through to Washington and they locate the man. They are supposed to keep track of them until they are discharged, and then they have their last known address there. They check there, and when we have exhausted all possibilities, then we go to the FBI.

The Court: You might examine the captain.

Mr. Bloom: Are you finished?

Mr. Scholz: Yes. You go ahead if you wish. He is subject to recall.

#### Cross-Examination

By Mr. Bloom:

Q. Captain Jones, referring to [172] Defendant's Exhibit B for identification, would you please

(Testimony of Robert S. Jones.)

mark on this map, Captain, where the artillery ranges are located?

A. Do you have any particular caliber? They fired 105s, 155s, 70 caliber.

Q. Let us start with 105s.

A. Most of the mortar fire, the flat trajectory fire, was generally to the northeast. Here you have Sugarloaf Mountain. This broken line represents the extremity of the reservation. Depending on the range of these weapons, their fire existence was established. That fixed the fire. However, they had problems during which time they would actually move these pieces from one point to another, but generally they fired them to the northeast up in this region here (indicating). This was probably the greatest impact area for the heavy caliber artillery.

Q. Would you mark that heavy impact area with the letter "A"?

The Court: Use a colored pencil. "A" is the heaviest impact area shown in a northeasterly direction.

The Witness: Before I do that, may I also point out to you that heavy caliber firing was also directed in this portion of the range here, from firing positions in this region?

Q. (By Mr. Bloom): Will you first mark the heaviest impact area "A" and this other impact area "B"?

A. Yes. I want to be frank with you. Based

(Testimony of Robert S. Jones.)

on my survey I found the greatest number of duds existed in this area. [173]

The Court: Greatest number of what?

A. Duds.

Q. In the area?

A. In the area. Hoowever, I understood the greatest amount of firing was done in this area. However, that may be due to the fact that they were shooting at a smaller target here.

Q. Would the nature of the terrain have a great deal to do with duds? A. Yes, sir.

Q. Soft as compared with hard area?

A. Yes. I might point out that there is an ordnance man here, or was, who is better qualified than I to give you that detail.

Q. At least for the time being "A" would con- note the point of impact representing the heavier— A. Heavier calibrated.

Q. The heavier caliber? A. Yes, sir.

Q. And "B" would also be heavy caliber.

A. That is 105 you referred to?

A. The 70 mm. rifles, particularly in this region here. Actually, that is based on my recollection of these firing reports.

Q. (By Mr. Bloom): Were there any other concentrated artillery impact areas that you [174] recall? A. The heavier caliber?

Q. Let us go to a lighter caliber.

A. Well, yes. Incidentally, this information I am giving you is based on what I actually found in the field in the way of unexploded missiles plus

(Testimony of Robert S. Jones.)

what little information my file disclosed. As I stated earlier, the organizations usually handle those records within themselves and much of this information was based on what Sgt. Hodges, who had been in the range office for three years previously, had accounted to me. Back down to this area here, where we have the moving through range, there was a great deal of 37s fired. However, most of it, as has been brought out, was that armor-piercing type. I understand they fired a great deal of tracer along with the armor-piercing.

Q. There would be no explosive?

A. No, it would usually be expended by the time it hit the ground; nothing explosive, unless they developed a projectile that I am not familiar with later on. You are not interested, I believe, in the flat trajectory small arms, such as 30 or 50 caliber. They did not shoot the explosive projectiles outside of rifles. They even had the solid projectile or the phosphorus type projectiles, phosphorus type being simply to designate their fire so they could observe their firing, their impact. Also in this area, apparently from what I discovered, found, they had been fighting a few problems where they used [175] 60 and 80 mm. mortar, which is a curved trajectory shell.

Q. When did you discover that?

A. That was during my survey in October of that year. About in October I took details of men out and we spent over a week, ten days, or maybe better, covering each one of the impact areas in

(Testimony of Robert S. Jones.)

air skirmishes similar to the de-dudding operation previously.

Q. This mortar fire, where was that impact area?

A. Well, the mortars that I found were apparently fired during problems, at which time they simulated combat and they moved in. You will note here we have a crossroads called Waldo. As I recall, Waldo was a mock-German town being defended by German forces, either represented by our own or in imagination, and the problems would usually be fought from various directions in to Waldo or this general area here.

Q. Would you mind marking that so on your map?

A. Frankly, we were not too interested in surveying that particular locality because there was no concentrated position firing done there.

The Court: That was an approach area?

A. Yes. We referred to it as combat range.

Q. (By Mr. Bloom): Does that, then, constitute the main artillery impact areas?

A. As I recollect. However, I wish I could give you more detail and a more accurate idea of just what firing, types of [176] firing, and so forth, did take place, but it is difficult. I do know we have ranges where I would move army vehicles as units and they fired as we progressed, and they revamped these ranges many times. In fact, to my understanding, originally the Government had leased only a small portion of this range area and later added what is represented here.

(Testimony of Robert S. Jones.)

Q. But in any event, according to your survey and your best recollection, the areas in or around points A, B and C would indicate the principal impact areas, is that right?

A. Well, A and B would be the heavy caliber and so—well, I might say this entire region here we found mortar 37. They are actually infantry or were at that time infantry weapons used in conjunction—for the support of infantry and chiefly as an organic weapon.

Q. May I take a look at the map again? I think you stated you had an initial conversation with Mr. White some time in September of 1946 at your post range headquarters, is that right?

A. It was on or about that time, yes, sir.

Q. Did you have any maps of the area available at that time?

A. Yes, sir, posted just behind my desk.

Q. Were they maps like this or in more detail?

A. It was a much larger map, approximately five feet across. It was a tactical map, that is, a surveyor's map.

Q. You testified Mr. White on this initial occasion explained the type of metal, to use your words, very clearly that he was [177] interested in, is that true?

A. To my satisfaction, yes, to the extent that I was impressed that he was not interested in the iron projectiles.

Q. You understood, did you not, that he was not interested in ferrous metals?



(Testimony of Robert S. Jones.)

A. My conclusion was to the effect that he was interested in brass casings primarily.

Q. It is a fact, is it not, that in all the artillery impact areas that you have designated, the metals are, for the most part, iron or ferrous metals?

A. Yes.

Mr. Bloom: I believe there is on file answers to interrogatories propounded to the witness. If your Honor please, I would like to use them at this time.

The Court: Yes, you may use them. Here is the file. You might show the captain the answers.

Mr. Bloom: You see, the original apparently is not on file.

Q. As a matter of fact, Mr. White told you at this time, did he not, that he was not interested in the artillery ranges or the artillery impact areas for that reason, isn't that the fact?

A. Well, that was my opinion at the time. I don't remember exactly what his statement was, but I arrived at that opinion. I do remember I volunteered to have my sergeant take him, [178] however, to any range that he desired to see.

Q. I take it, then, from the conversation and the words that passed between you, you understood he was not interested in the artillery impact areas, is that correct?      A. Yes, sir.

Q. Referring to the second conversation which you testified you had on or about November 18th, 1946, with Mr. White in talking about his demolition experiences as a Seabee in Saipan, you under-

(Testimony of Robert S. Jones.)

stood, did you not, that they referred to the activities of the C.B.'s in the demolition of structures or buildings? [179]

A. No, it was my opinion at that time—of course, I am familiar with the military association of the word “demolition,” and it was my opinion at the time that he suggested it was not necessary for me to discuss his conduct around on ranges possibly contaminated, that is, areas where duds might exist.

Q. At that time, I take it—

Mr. Scholz: Let him finish his answer.

Mr. Bloom: I thought he was finished.

The Witness: It was an assumption on my part at the time when he mentioned demolitions, that he was referring to demolition in the sense of the word that we use it.

Q. (By Mr. Bloom): And you made that assumption because that is the way it was used in the Army?

A. Yes, and it was applicable to the conversation—I mean the trend of conversation, to my way of thinking.

Q. At that time you did not know what the procedures or practices of the CB's were?

A. No, I did not.

Q. You did not know what the term “demolition” meant in the CB parlance, I take it?

A. No.

Q. So that your conclusion was based upon your own terminology?

A. True.

(Testimony of Robert S. Jones.)

Q. Isn't it a fact, Captain, that in the Army and in the [180] Air Force personnel that is off duty is permitted to engage in private employment on home bases or in areas adjacent to home bases?

Mr. Scholz: Just a minute. That is assuming something in evidence, that they are off duty.

The Court: Overruled.

The Witness: But I might make several statements that would be applicable to your question. One, for instance, normally during that time anyway personnel were not allowed to engage in private enterprise, of course, with reference to activities off the installation. If they were injured while so engaged, the Government was not liable for their, well, medical expenses, and so forth. We considered it not in line of duty.

Q. (By Mr. Bloom): I understand that, but you know it was common practice for personnel off duty to engage in private employment, do you not?

A. Yes, I agree with you, because as public relations officer at the time I had many labor unions complaining that they discovered soldiers working here and there, and, of course, I naturally had to turn it over to the Provost Marshal and recommend to him that the men have the law clarified to them and that they sever their employment.

Q. But they were not forbidden from engaging in private employment, were they? [181]

A. Well, I am frankly not a personnel man. I make my statements based on my experience in conjunction with the——

(Testimony of Robert S. Jones.)

Q. So far as your experience is concerned, did you know of any directive to personnel to the effect that they could not engage in private employment when off duty?

The Court: The fact of the matter is they were engaged in private employment.

Mr. Bloom: Yes, with the knowledge, I submit, of the Superior Officer.

Mr. Scholz: Oh, no, the Captain testified he had no knowledge. In fact, the Captain told him they could not be employed.

The Court: All right.

The Witness: Whether it was regulation or policy I do not know, but at that particular installation it was assumed not to be permissible, unless the commanding general as such, through his arrangement with, say, an employer, for the purpose of the war effort—such as picking the rotting fruit on the trees—permitted the men to work.

Q. (By Mr. Bloom): But you do not know, in answer to my question, of any directive forbidding any such private employment, do you?

A. No, specifically, no.

Q. You state you supervised a survey of the ranges near the time of the accident. Can you tell us when that survey [182] was conducted?

A. As I recollect, it was during the month of October, 1946.

Q. Will you tell us what the nature of that survey was and how it was conducted?

A. Yes. When the commanding general of the

(Testimony of Robert S. Jones.)

installation received information from Washington that Camp Beale had been designated to become surplus, we had a commitment to the district engineer with regard to the status of our ranges. He desired to know whether they had been de-dudded in conformity with the applicable circular. I do not recall the circular offhand. My records indicated that they had been. However, being *nearly* around as range officer, and having from time to time discovered duds, felt that I should personally ascertain the degree, the actual degree that the de-dudding had been accomplished. Now, many of those duds have been washed through the last two or three years since the firing had ceased by rain, wind, kicked up by cattle, and they were being reported occasionally. Therefore, with the commanding general's permission and at his directive, I took details of men which I had obtained from the post operating company or the military police barracks or wherever I could get them, took them out to those areas that my records indicated as the most probable impact areas, formed the men in a line skirmish, with the line dependent on the terrain, and we moved as a body over these areas and marked the duds [183] as we came to them, and marked them on our overlay for later disposition.

Q. Did you use any mechanical or electrical equipment in the location of any of these duds?

A. No, we discussed the feasibility, however.

Q. Did you depend solely on your eyesight as you walked over the ranges?

(Testimony of Robert S. Jones.)

A. According to the circular that the original de-dudding operation had been based on, that fulfilled the requirements.

Q. You refer to the circular in evidence in this case, Circular 195?

A. I would have to see this report of 1944. It is quoted in there, I believe, or my report submitted in 1946.

Q. I submit to you Plaintiff's Exhibit No. 12 and I will ask you if that is the de-dudding circular you have reference to.

A. I believe it is. However, my survey was not made in accordance with any regulations.

Q. I thought you just testified that your operations were made and your procedure was pursuant to this circular?

A. May I clarify that? My intention was to explain that our plan of operation was similar to the operation employed in the de-dudding program in 1944.

Q. Was there anything contained in that circular which indicates that you should not, or advised not to use mechanical [184] or electrical equipment to locate metallic duds?

A. We discussed the feasibility of using scientific instruments, but it was our discretion. That was in the discretion of the district engineer, because we had no such equipment organically, and we had no personnel so qualified to use it.

Q. You are familiar with the fact that such scientific instrumentalities existing are used?

(Testimony of Robert S. Jones.)

A. Certainly.

Q. But they were not used in this instance?

A. It was impracticable for us to use such instruments. I might add it probably would have cost many, many thousands of dollars to have mathematically covered those impact areas with such instruments.

Q. Aside from the cost, there is nothing in science or in nature that would prevent such methods being used or such machinery being used, is there?

A. No, but offhand I would venture to state from my recollection of the regulations that if the land was to be used—I mean to be placed on sale, leased or used for cultivation and building, it may or may not have been warranted, depending upon that particular situation.

Q. You say that that is also contained in this circular?

A. No, sir.

Q. You referred to a regulation. What regulation do you now refer to?

A. I refer to no regulation or circular. I was simply [185] venturing information based on my experience and recollection of the regulations I have seen in the past. I do not know whether they were in the form of circulars, directives, or what the nature of them was, but naturally at the time I investigated any and all directives that might pertain to the surplusage of those ranges. And we even took the matter up before the Executive Council, and at that time it was the decision of the coun-

(Testimony of Robert S. Jones.)

cil and it was not our decision. It rested upon the chief engineers. We could recommend such action, but that was the limit of our authority or interest.

Q. And the chief engineer did not so recommend?

A. No. I did not see his reply to the letter presented, but as I remember from the discussion, later discussion, it was not feasible due to the cost, and furthermore to the fact that the land was adjudged grazing land, primarily for grazing purposes, of little value for cultivation.

Q. It was known at that time that the Army was entering into a contract for the collection of scrap metal in that area, was it not?

A. Yes, we knew that bids were being let for scrap metal.

Q. I show you a copy of your response or answers to interrogatories propounded by the plaintiff, and I call your particular attention to the twelfth interrogatory, which refers back to the eleventh interrogatory, the eleventh interrogatory being, "Was any warning of danger given by any [186] Army officer or other Army personnel to the plaintiff prior to his entry on said strafing range at Camp Beale on November 22nd, 1946?"

And the answer is, "Yes."

You remember giving that answer, do you not, in this sworn statement? A. Yes, that is true.

Q. Calling your attention now to the twelfth interrogatory, which reads, "If your answer to Question 11 is in the affirmative, then give the



(Testimony of Robert S. Jones.)

name or names of the officers or armed personnel giving such instructions and the precise nature of the instructions or warning, if any, given.”

And in response to that I will ask you if you did not then make the following answer under oath to that interrogatory,

“A. I, Robert Sumner Jones, at the time Captain A. C. attached AWS as post range officer instructed Mr. John Phillip White, the plaintiff, that in all probability duds existed in the artillery impact areas and areas adjacent thereto.”

Is that the answer that you gave?

A. In effect, yes.

The Court: Counsel and Captain, it is quite evident that you will be quite some time.

Mr. Bloom: It is a little longer than [187] anticipated.

The Court: It is now getting close to four o'clock. I have a meeting scheduled in the American Can case which will probably run me to six or seven. I suggest that we stand over to Monday.

Mr. Bloom: Very well, your Honor.

(Thereupon an adjournment was taken until Monday, November 6, 1950, at 10 o'clock a.m.) [187-A]

(Testimony of Robert S. Jones.)

November 6, 1950

The Clerk: John Phillip White vs. United States of America, on trial.

Mr. Bloom: If your Honor please, pursuant to the permission heretofore granted, I offer for filing Claim of Lien of the Industrial Indemnity Company.

Captain Jones, please.

Sumner Jones, resumed the stand, having been previously sworn.

The Clerk: Permit me to inform you, you have been heretofore sworn and you are still under oath.

The Court: All right, sir.

### Cross-Examination

(Continued)

By Mr. Bloom:

Q. Captain Jones, I believe that on Friday you testified that certain signs were posted at the Camp Beal Military Reservation to the effect that the public was warned to stay on the travelled roads?

A. That is correct.

Q. Is that correct?

A. That is correct.

Q. I take it that that was the substance of the warning contained on the signs you have referred to?

Mr. Scholz: You mean the substance, just the substance of what you're saying now?

Mr. Bloom: I think the question is clear. [2\*]

The Court: Yes, I think so, Captain. The Captain may answer.

(Testimony of Robert S. Jones.)

A. No, I don't believe that was the substance. That was a modification, you might say, of the warning, the sign stating in effect, warning entering upon firing ranges, and then that later simply, I believe, a modification—at least that was my opinion.

Q. I see; but in any event would your present explanation, that in substance is what these signs you referred to contains, is that right?

A. Well, a notification that one was entering upon a firing range.

Q. I see. Now, do you have any photographs of these signs or copies of them?

A. No; however I might suggest that they may still possibly exist on the reservation.

Q. You don't know——

A. I do not know, not having visited the reservation, oh, since a few months after they closed the installation.

Q. The investigative file to your knowledge, doesn't contain any replicas or duplicates or photographs of any of these signs?

A. I do not believe——

Mr. Scholz: I suggest that the investigating file has been offered for identification, these may be shown to the Captain to refresh his memory, or refer to the report. [3]

Mr. Bloom: Well, I have no objection to his looking through to see if there is any replicas there. That is "D" for identification.

(Testimony of Robert S. Jones.)

Q. Just look through here and see if you find any photographs or any copies of any signs?

A. I do not.

Q. Did you supervise the placement of any of these signs that you refer to?

A. No, sir, the signs existed at the time I took over my duties, the signs I refer to.

Q. Do you know how far apart these signs were?

A. They weren't placed with the thought of interval, but simply placed at those strategic points of entry into the range areas.

Q. I see. You wouldn't know if there were any particular signs in front of any particular range area, I take it?

A. Not at the time in question, no; I don't believe so.

Q. Now, Captain, did I understand that in the normal operations of the Post firing ranges and in the routine of your office as Post Range Officer, that you periodically received reports of duds or unexploded shells on the various ranges, is that correct?      A. That is true.

Q. And in response to these reports is it your testimony that you forthwith sent a detail out there to have the shells exploded or removed from the ranges, is that right?

A. In substance, but may I explain that upon receipt of the [4] notification of the existence of duds, I would apply a buck slip, so-called, or an inter-office memo to the communication requesting the ordnance demolition people, notifying them of

(Testimony of Robert S. Jones.)

this situation, requesting that they send their team out to dispose of it.

Q. The especially trained squads, is that right?

A. True.

Q. And I take it that until the shells have been detonated or otherwise safely disposed of that nobody was permitted to go out on the ranges, isn't that correct?

A. No, not in substance. If we received notification that anybody would have cause to be on a particular range, we naturally informed them of the existence of the dud, its location, et cetera, but to insure that they knew it was there and would not approach it.

Q. Well now, Captain, you would not permit a civilian, would you, to go out on a range where there were marked duds that you knew about?

A. Not unless I assured myself that he knew the presence of the duds and their locations and had been forewarned not to approach them.

Q. But if you gave him that warning and then you considered it perfectly safe to permit a civilian to wander around the range in question, is that right?

A. Well, inasmuch as it was my responsibility, that is my [5] responsibility for any incident on the ranges, naturally I always assured to my satisfaction that they knew of those duds. I believe that has been brought out by token of the fact that we, you might say, used extraordinary measures to warn the public that duds did exist.

(Testimony of Robert S. Jones.)

Q. Now, in reference to the strafing area which has been designated as the area between the targets and target finders on Plaintiff's Exhibit Number 11, this diagram, you knew, Captain Jones, did you not, before the date of this accident that there were unexploded duds on that strafing range?

A. I assumed that there may be duds. However, I knew of no duds in particular existing on that range, any dud that had been called to my attention we had taken care of in accordance with our standard operating procedure.

Q. Now, you heard the testimony—you were in the courtroom and you heard the testimony that Sergeant Hodges, amongst others, told——

Mr. Scholz: I don't think Sergeant Hodges testified.

Mr. Bloom: Well, the testimony is to this effect——

Mr. Scholz: Well, that was the statement, that was the testimony of Mr. White, not Mr. Hodges, Sergeant Hodges.

Q. (By Mr. Bloom): You knew, did you not, that—you heard the testimony, did you not, to the effect that Sergeant Hodges told Mr. White of the existence of a marked dud on the strafing range; didn't you know about that? [6]

A. I heard testimony to that effect, yes.

Q. Well, hadn't you received any report prior

(Testimony of Robert S. Jones.)

to the time White went on that range that that marked dud was on that range?

A. I had not.

Q. Well, did you receive any report after the accident to the effect that that marked dud was on the field?

A. I do not recall of such report, no.

Q. Now, to refresh your recollection, Captain Jones, I show you a memorandum which is attested to be a true copy by Captain Frederick C. Sullivan, memorandum to: Post Range Officer, attention Captain R. S. Jones, which is dated November 29, 1946, and I will ask you if you ever received this memorandum in your office?

Mr. Scholz: I object to it, that was after the accident.

Mr. Bloom: Well——

The Court: Overruled.

A. Yes, I did receive this memorandum.

Q. (By Mr. Bloom): You now recall receiving it? A. Yes.

Mr. Bloom: Your Honor please, I offer in evidence this memorandum as Plaintiff's Exhibit next in order.

The Court: What is the nature of it?

Mr. Bloom: This is the memorandum, subject: Demolition of Dud. A memorandum to Post Range Office, attention Captain [7] R. S. Jones.

“1. The following dud has been located and marked by danger flag awaiting disposition by demolition technician.

(Testimony of Robert S. Jones.)

“a. 1 61 mm. mortar shell approximately 100 yards north of signal tower on strafing range.

“2. Demolition technician should contact post operations or range office to be guided to dud. Signed Technical Sergeant Frank C. Hodges, Range Sergeant.”

The Court: It may be marked in evidence.

The Clerk: Plaintiff's Exhibit 13.

(Whereupon the memorandum dated 29 November 1946, above referred to, was received in evidence as Plaintiff's Exhibit 13.)

Mr. Scholz: That is part of the report of the Claim's Officer, isn't it?

Mr. Bloom: I don't know, it is a paper which was handed to me along with a group of other papers.

Mr. Scholtz: Stipulated it came from the report here, Defendant's Exhibit "D" for identification.

Mr. Bloom: Pardon?

Mr. Scholz: It will be stipulated it came from the report which the United States Attorney's office, referred from the headquarters, 5th Army, Defendant's Exhibit "D" for identification.

Mr. Bloom: I don't know, it is a paper I got out of— [8] attached to this letter, if Your Honor please.

The Court: Well, is that the fact, is it?

Mr. Scholz: Sure. It shows in here, I mean—

The Court: That may reflect itself in the record.

Mr. Scholz: Yes, it is.



(Testimony of Robert S. Jones.)

Q. (By Mr. Bloom): Now, I show you, Captain, a similar—

Mr. Scholz: Defendant's Exhibit "K," report to Captain Jones, Range Officer.

The Court: All right, sir.

Q. (By Mr. Bloom): I now show you a memorandum of the same kind and character dated December 4, 1946, and I will ask you if you received that memorandum on or about the date it bears? •

A. I did.

Mr. Bloom: I offer this in evidence as Plaintiff's Exhibit next in order.

The Court: It may be marked.

Mr. Bloom: Subject demolition of duds.

"1. The following duds have been found on our strafing range and are marked with danger flags:

"a. Five 37 mm. duds

"One 75 mm.

"One small practice bomb

"One 61 mm. motor dud.

"2. These duds should be destroyed by a demolition technician as soon as possible. He will be guided to duds [9] by one of the range personnel. Signed Frank C. Hodges."

The Court: In point of time, Captain, these reports were received after the incident in question?

The Witness: Yes, sir.

Q. (By Mr. Bloom): Now, as I understood it, Captain, you made a survey of the ranges sometime during the month of October, is that correct?

(Testimony of Robert S. Jones.)

A. That is correct.

Q. Of 1946—

The Clerk: Plaintiff's Exhibit 14 in evidence.

(Whereupon the memorandum above referred to, marked Plaintiff's Exhibit 14, was received in evidence.)

Q. (By Mr. Bloom): Your survey included, did it, the area which we have called the strafing range on Plaintiff's Exhibit number 11?

A. May I see that map of the camp once more, the installation, I believe it is.

(Witness looking at map.)

As I recall, we operated in that sector. Whether or not we actually covered the portion in question, I do not know. However, I might remind the Court that I believe the district engineer would have my map indicating the exact areas that we covered in this hasty survey.

Q. Well, I am asking you to resort to your best recollection. You know what we mean when we talk about the strafing range, [10] do you not?

A. Yes.

The Court: That is the range indicated on the diagram on the blackboard at the top, Captain, marked north, target and target finders.

The Witness: Is that a proportionate diagram, do you know?

Mr. Bloom: Yes. Well, the scale, Captain, is 200 feet to the inch, approximately.

(Testimony of Robert S. Jones.)

The Court: Will we complete this case by tomorrow morning?

Mr. Bloom: I am just finishing the cross-examination, I will be finished.

The Court: Mr. Scholz?

Mr. Scholz: I think we will finish today, if it doesn't take any more than 15 or 20 minutes we will finish it today.

The Court: Yes.

The Witness (at the blackboard): Would you assist me in locating the area on the map? I believe I have it located. We have the Wheatland Road coming in here (indicating), which is here and this road intersection bound on the nine and ten, apparently these are the two ranges.

Q. (By Mr. Bloom): Yes, the antitank ranges. I think that your x mark is pretty accurate.

A. I would venture to say that in all probability we did survey that, at least the northernmost portion of that range, the impact area, I should say, where we expected the 60 and 81 mm. mortar [11] shells to land.

Q. Well now, in inspecting this range did you find any duds or unexploded shells on the strafing range?

A. I do not recall, frankly. We covered thousands of square acres and that we had a small detail of men ranging from, say, 15 to 30 men, and we had a limited time to conduct the survey. We simply wanted an idea of the condition. We moved so rapidly making our survey on a daily report

(Testimony of Robert S. Jones.)

basis, later consolidating, that I would hesitate to make a remark to that effect.

Q. You would have to refer to this survey of yours, wouldn't you?

A. I would much prefer to refer to it inasmuch as it was accurate.

Q. We haven't got the survey. It is a fact, is it not, Captain, that you were surprised to learn that a marked dud had been permitted to remain out there on that field without your being advised of it, isn't that true?

A. You mean from what I have heard in the future—I mean, in past testimony, yes, that does surprise me.

Q. Aren't you surprised when you see now, even now this report that comes in from Sergeant Hodges?

A. No, I remember those reports well because at the time of the investigation the investigating officer asked for past records and at the time I explained we did not keep on file any record of those when they had been disposed of, that the [12] ordnance personnel received the original and for that matter he would have to contact them for copies. However, I did tell him that we had, he could get these two copies which were current which he appended to his file.

Q. Let us put it this way: You found out after the accident, didn't you, that there was a marked dud on that field at the time White entered it, isn't that right?

(Testimony of Robert S. Jones.)

A. I believe the date on that report was the 29th, wasn't it?

Q. Yes.

A. 29th of November and the accident occurred on the 22nd.

Q. But you found out from Sergeant Hodges or from some other source that when White went on the field that marked dud was out there, did you not?

A. I don't recall such a dud at the time. However, as far as I remember the dud in question in that report was discovered at a later date.

Q. Yes, but again I go back. You did find out, either verbally or otherwise, that there was a marked dud on the field that you hadn't been told about when White went out on the field, that is true, isn't it?

A. Referring to what I discovered, or what I heard at the time of the accident or what I have heard in the testimony?

Q. I am referring to what you found out after the accident at Camp Beal?

A. Well, from my recollection I did not receive an official [13] notification that such a dud did exist.

Q. Exactly, but you did find out that it in fact existed and was on the field, did you not?

Mr. Scholz: Already asked and answered, the subject matter, asked several times.

A. I don't recall that there was; that I did find out there was a dud outside of the one which exploded on the field at that time, no.

(Testimony of Robert S. Jones.)

Q. When you talked to Mr. Goldberg, you were surprised, were you not, that you hadn't been informed that there was a marked dud on the field; you remember that?

A. I recall during the interview with Mr. Goldberg that he did make a remark that he had seen a dud out there, yes.

Q. And you were surprised and angry, were you not, that your records did not disclose the presence of it?

A. Yes, I would have been. However,——

Q. Now, Captain——

Mr. Scholz: Let him finish.

Mr. Bloom: I thought he was.

The Witness: As I was going to say if the dud report dated the 29th had been submitted on that particular dud, it would seem irregular to me, because normally those reports were dated as of the date of discovery and I believe the gentleman came to see me the day after the accident.

Q. Yes, and you had no report at that time of the presence of [14] the marked dud?

A. No, I did not.

Q. All right. Now, in respect to your conversation with Mr. White, did you explain to Mr. White the fact that there had been no use of any scientific or electrical or mechanical equipment to locate duds on the strafing range?

A. I don't believe I made any remark to that effect to Mr. White, no.

Q. Did you inquire or make an examination of

(Testimony of Robert S. Jones.)

what his knowledge was of high explosive ammunition or the like?

A. No, I didn't make an entry to that extent.

Q. Did you show him any types or kinds of high explosives which he was likely to encounter on the strafing range in question?

A. No, I had no such shells in my office, but for that matter I had received his assurance that he had a familiarity with duds.

Q. You refer now to this talk about Saipan and the fact he was in the Seabees?

A. Yes, it was a remark to that effect.

Q. And now, concerning the condition of the strafing range and adjacent ranges at the time this accident occurred, would you tell us a little bit, Captain, about the condition of the terrain, specifically this is level country, is it, except for where this valley is indicated on the map? [15]

A. As I recall, the antitank ranges were on level, the firing points to the impact area were on level terrain, developing into slightly rolling land north of that point.

Q. Now, it is true, is it not, that this country is covered to a certain extent with grass?

A. Yes.

Q. It is true, is it not, that at the time of the year that this accident occurred, namely in November, of 1946, that that grass is fairly high in places?

A. Yes.

Q. It is true, is it not, that a visual inspection of that terrain would not, to the eye, reveal hidden

(Testimony of Robert S. Jones.)

missiles, exploded or unexploded, isn't that true?

A. It would limit one's ability to discover them, yes. It did hamper us in our work, I will make that remark.

### Redirect Examination

By Mr. Scholz:

Q. Captain, there is no regulations violated that you, either as an individual or as a range officer, knew of?

Mr. Bloom: I didn't understand the question.

Mr. Scholz: Read the question.

(Question was read.)

Mr. Bloom: I will object to that as calling for the opinion and conclusion of the witness, namely, the word violation. [16]

The Court: What if any regulations were there in effect, you want that question?

Mr. Scholz: Yes, I want to show that any regulations that may have existed, there was no violation so far as he knew, either individually or as a range officer and coming within the purport—

The Court: Do you know of any regulations on the particular subject of demolition or detonation of duds, or directives or the like other than what may appear thus far in evidence?

The Witness: I am not aware, no, sir.

Q. (By Mr. Scholz): And you do not know as range—do you know whether—do you or do you not



(Testimony of Robert S. Jones.)

know if there was any violation of any—of any violation?      A. Pertaining—

The Court: Sustain the objection to that question.

Q. (By Mr. Scholz): I believe you stated you had no knowledge of any duds not marked prior to the accident, is that correct?

A. That is correct.

Q. And then, referring to that map, if you wish, is that hill on the artillery fire, is that the impact area of the artillery that is up in the hill?

A. The heavy caliber artillery?

Q. Yes.

A. That was not an impact area for heavy caliber artillery.

Q. What was the impact area in the hills, what sort of firing? [17]

A. That particular impact area in question was impact for antitank weapons, such as 37 and bazooka may have been used, it was presumed that may have been. Also air-ground strafing which would be 30 or 50 caliber bullets.

Q. Would that be in the hills?

A. Well, that would be—I am speaking now of the area in question.

Q. Well, you have that map there? If I remember my map reading, Captain,—it has been a few years since I done it—the contour lines here show hills, I am referring to the—wait a minute, see how close these contour lines here are?      A. Yes, sir.

Q. Show a high spot there?      A. Yes, sir.

(Testimony of Robert S. Jones.)

Q. That is the closer those contour lines are, the steeper the grade? A. Yes, sir.

Q. And 50 feet, between 50 feet contour lines, that would be hills up here? A. Yes.

Q. That is what I am asking you, what impact area was that up where the hills are shown on the map and the hills on here, too (indicating)?

A. Well, of course the firing of the heavy caliber artillery was controlled by two things; one, the range of the projectile [18] the other the terrain. We had, depending upon the caliber of the artillery pieces, we had firing points back in this locality (indicating).

Q. That is where you fire from, the firing points?

A. From firing to an impact area to the west of Sugar Loaf Mountain.

Q. And the impact area is where the shell lands?

A. Yes.

Q. What was used there?

A. As I recollect 105 Howitzers and weapons of that caliber. They were fired generally from positions in a western sector into this general impact area. Now, we had a second impact area for heavy artillery fired from positions in the southwest area, in through here (indicating) to targets in the area I have designated as "B." That was primarily a 75 caliber, they need a much greater range than could be obtained along this firing shown here. Now, to my recollection those are the only two areas employed for heavy caliber artillery fire.

Q. All right.

(Testimony of Robert S. Jones.)

Mr. Scholz: Would you mark this for identification?

The Clerk: "E" for identification.

(Whereupon the document referred to, was marked Defendant's Exhibit "E" for identification.)

Q. (By Mr. Scholz): Captain, I hand you herewith Defendant's Exhibit "E" for identification and ask you do you know what [19] that is?

A. That is an armor piercing type shell, 37 millimeter.

Q. And I hand you herewith Plaintiff's Exhibit number 4, and ask you what that projectile is?

A. This is an H.E. orexplosive type projectile. It could be better identified if I could remove it from the casing, however, because of its structure, has a different butt.

Q. You can refer to it as the—you can tell the Court, that what I am particularly interested in is the case, I am particularly referring to what we call the projectile as distinguished from the shell. The shell is the whole thing, isn't it?

A. Yes, sir.

Q. This lower part is called the case?

A. Case.

Q. Case and the upper part is the projectile?

A. Projectile, sometimes referred to as shell.

Q. Referring to the projectile part of it, is there a difference between that and the Defendant's Exhibit—

(Testimony of Robert S. Jones.)

The Court: That was the armor piercing?

Q. The armor piercing, with particular reference to the kind of metal?

A. The armor piercing is made of steel, solid steel, to my recollection. The H.E. type has, it has got a fuse head.

Q. I mean, talking about the metal, now.

A. It is a fuse case, is aluminum alloy, it has got its primer, [20] detonater, and so forth within it. The lower part of the casing is a cast of mixed steel containing a powder explosive charge concealed within the casing. Here we have a bow-tailed area containing a core of phosphorous, or some other agent used for tracer, that core——

Q. That is tracer ammunition you have, then?

A. Well, as I recall all of the H.E. type had the tracer charge and that also is connected to the explosive chamber by a small powder corridor and in the event the fuse fails to detonate upon impact, normally a second or so later the phosphorous will have ignited the explosive charge.

Q. So if it didn't detonate on impact it would, the chances are very high it would go off anyway, is that what you mean?

A. Yes, sir. Very seldom would you have a dud normally and I believe it has been remarked by an ordnance expert that the duds are about one percent, conservative one percent may be duds.

The Court: What type of particular ammunition? This type?

A. This type, yes, sir, this particular shell, (in-

(Testimony of Robert S. Jones.)

dicating), which is—that is a pretty conservative odd in my opinion.

Q. Now, you say that was aluminum, that part, that projectile, would that oxidize or change if it was exposed to the air elements?

A. Yes, sir, I believe that it would take a dull grayish appearance and this shell would take a dark greenish appearance, [21] being brass, and of course the steel would rust.

Q. Now, what about the armor piercing, A.P.?

A. Well, being all steel it would rust. I have seen a number of those in the range house and they are very rusty, except, of course, for the rifling band—I forget what they call it, the bronze strip around them—I believe they are rifling bands. They would turn, I imagine, a dull green, such as copper would on oxidization. This seems to have a brass ring, this seems to be copper, or whatever that—I don't recall whether there is a particular identity between the two projectiles.

Mr. Scholz: That is all, Captain.

Mr. Bloom: One or two questions.

### Re-Cross Examination

By Mr. Bloom:

Q. Now I show you again, Captain, Plaintiff's Exhibit number 14, which is this report from Frank C. Hodges, Range Sergeant, and I will ask you if it does not appear on this report that as of this date five 37 millimeter duds were located on the strafing range? A. Yes, it does so appear.

(Testimony of Robert S. Jones.)

Q. And when you went out on your own survey, Captain, didn't you find some 37 millimeter duds yourself?

A. As I recall we did find some 37 millimeter duds, but I don't recall where.

Q. You don't recall where, do you recall how many? [22]

A. No, I do not.

Mr. Bloom: That is all, thank you.

Mr. Scholz: That is all.

The Court: I have a couple of questions.

By The Court:

Q. Ordinarily, Captain, how much time would elapse under ordinary circumstances after a report of a dud was made to you, in the regular course of affairs, until such time as you would order or cause to be ordered or directed a demolition team to make its survey and consummate its objectives, how much time would elapse? Take the ordinary course of events.

A. On the average, sir, I would say from four to ten days, at most.

Q. And how far distant would this team be housed; where were they located?

A. That was the depending factor. They might, at the time, would be at Fort Ord.

Q. I see.

A. And the headquarters of the Sixth Army were in San Francisco.

Q. You didn't have such a team located under your immediate supervision or direction?

(Testimony of Robert S. Jones.)

A. No, sir, we had to request it through the Sixth Army Channels.

Q. Are they a highly specialized and trained team? A. Very highly. [23]

Q. And the hazards involved in their undertaking extremely great?

A. It is extremely hazardous. And may I point out there are some antipersonnel type bombs or shells that if not discovered to be such and a man not qualified attempted to remove the war head, just the slightest motion, unscrewing motion would blast it. They are designed for that purpose to eliminate curious people that attempt to take them apart.

Q. Is that service of a voluntary nature, are these men appointed or trained exclusively by reason of their background or particular technical knowledge?

A. Normally it is voluntary, because of the nature of the hazard. I might point out in our service, unlike most of the other services, most hazardous duties, such as submarine duty, paratroop duty, flight duty, is strictly voluntary.

Q. Now, on the unexploded dud which appears to be marked on the blackboard with an "x" to which reference has been made occasionally here in the course of this trial, did Mr. White, the plaintiff in this case, report to you or anyone under your supervision that he had re-marked that dud?

A. He did not report such fact to me. However, if he did mention it to my subordinates I did not hear of it. I had two men at that time assigned to range duties, Sergeant Hodges and Private Fuller.

(Testimony of Robert S. Jones.)

The Court: From the records available in this court, to [24] the best of your recollection how much time elapsed from the original notice, if any, given to you of that unexploded dud until its removal or detonation?

A. You're referring to the one in the report?

Q. Marked "x," marked "x" on the blackboard, on the diagram, rather, that is the one to which Mr. White made reference he re-marked by placing a monument around it of some kind.

A. Sir, to my recollection I don't recall that particular incident. I do recall that Mr. Goldberg remembered that he had seen a marked dud out there.

Q. Well, Sergeant Hodges would have some information on it?      A. He may have had.

Q. Now, directing your attention particularly to the survey you made, what was the underlying purpose of that survey?

A. The district engineer, having attempted to determine the status of the ranges through, you might say, a routine letter, requesting whether or not the provisions of War Department Circular, I believe, 195, had been carried out. My report being in the affirmative, realizing that we had discovered duds from time to time, I did not want my report to reflect to him that no duds did exist. Therefore, I decided to make an actual physical survey of the impact areas, the greatest impact areas, to get an idea of the ratio of duds still existing, and at that time, upon completion of the survey, I recommended to the deputy commander that such duds and such



(Testimony of Robert S. Jones.)

ratio did exist [25] and recommended that he request the district engineer to send demolition squads to the ranges to decontaminate those particular areas evidencing the greatest number of explosive type duds.

Q. Were those squads sent there?

A. No, sir, as I recall the deputy did write the district engineer to that effect, and as I recall the engineer pointed out to him the tremendous expense involved in de-dudding those areas and why it was not contemplated these areas that would be used for cultivating or building, that it was not practicable to go to that extent.

Q. Do I understand then that assuming that in a given area that might be designated as the housing area, ultimately as a housing area, under such conditions, mindful you might have excavation work, you would have made a survey and the demolition squads would go in there, or is that right, before turning it over to the civilian populous?

A. That would be subject to the discretion of the district engineer, because he has to clear that property before it is sold or leased. That is the practice. However, if there is going to be any building they will send their demolition squads to the area to de-dud it. However, I do recall seeing in an engineer's letter or directive something to the effect that if after the engineer made his survey he decided the cost of de-dudding would be over a certain amount that he could offer the deduction of that amount from the sale value of the property. [26] Of course,

(Testimony of Robert S. Jones.)

that depended, I imagine—this is strictly my opinion—as to whether or not he had the personnel, the equipment at hand or thought it absolutely necessary morally to undertake that operation.

Q. Well now, you first met Mr. White in connection with your official duties and you made available to him such personnel as might afford him an opportunity to complete his work under the bid and precisely and specifically what conversation did you have with him concerning any hazard, if any, on the area to which he was going to direct his attention? Do you recall the specific conversation?

A. Sir, with reference to the earlier statement you made with regard to assistance?

Q. Yes.

A. I volunteered a guide to him, which was Sergeant Hodges. I did not volunteer any other personnel or equipment. During the conversation pertaining to probability of duds existing, I did explain to him, began to explain to him that being the firing range and impact area there were in all probability duds and that I must explain certain things to him. It was at that time when he assured me that he was familiar with demolitions, at least I gathered that he inferred that he was familiar with impact areas to a certain extent.

Q. At that time you had made a survey and the survey indicated there were duds? [27]

A. Yes, sir.

(Testimony of Robert S. Jones.)

Q. So that you were then thoroughly of the belief there were duds?           A. Yes, sir.

Q. And you so informed him?           A. Yes, sir.

Q. What, if any, response did he make, sir, to you?

A. He assured me he, having been in the Seabees and associated with demolition work, wasn't necessary for me to go into detail. However, I explained to him, that I appreciated that; however, I was morally obligated to go into detail, which I did.

The Court: I have no other questions.

#### Recross-Examination

By Mr. Bloom:

Q. According to the—do you recall that according to the answers to the interrogatories that you told Mr. White that there was a probability of duds on the artillery impact areas only, isn't that correct?

Mr. Scholz: I don't think he said that.

Mr. Bloom: Let us take a look at it.

The Court: It might answer it and look at the interrogatories and the answers he gave thereto.

The Witness: I would like to explain for clarification purposes that when we, as range personnel, refer to artillery ranges, we simply referred to the entire range, less the bayonet [28] or grenade ranges, which were in the proximity of the barracks areas or adjacent thereto. Otherwise, when we refer to artillery range we assume that it incorporated all of the range. I don't know what assumption Mr. White made.

(Testimony of Robert S. Jones.)

Q. You wouldn't know what assumption any civilian would make if you referred specifically to artillery impact areas, would you?

A. No, I wouldn't.

Q. No.

Mr. Scholz: Your Honor, please, I want to read that, in addition to the information given by the Captain, "that in all probability duds existed in the artillery impact area and areas adjacent thereto."

Q. (By Mr. Bloom): Now, referring to the map on which you marked the artillery impact areas, I now refer to Defendant's Exhibit "B" for identification, it is true, is it not, that the points which you have indicated are many miles away from the strafing area which you designated "x"?

A. Yes, that is true, "a" and "b" designations.

Mr. Scholz: Are you through?

### Redirect Examination

By Mr. Scholz:

Q. Captain, looking at this map, what are the adjacent areas?

A. Reference to adjacent area in the report meant the area where a stray, a short could have landed. Now, whereas you're [29] firing over a great range with 75 millimeter, in this case if you had an imperfect projectile it could fire——

Q. Fall short?

A. Short or over to the right or left of the in-

(Testimony of Robert S. Jones.)

intended course. We have found shorts, I might point out, oh, four or five miles short of the target area. Therefore, we had to report that fact that a possibility in the report and——

Q. As I understand it in your interrogatories you refer to the artillery range and adjacent area and you meant the entire, the artillery range was the entire range and adjacent areas, that which might fall short from the impact range——

Mr. Scholz: I think the word “adjacent” is in common use and this does violence to it. I object to the explanation——

The Court: Sustained, unless it has some military parlance.

Mr. Scholz: That is right. When you refer to artillery range, you mean any range, that covers it, and down at Camp Book they have an artillery range that covers small arms and everything else, designated right on the map. I never heard it referred to otherwise, except it might be designated as small arms.

The Witness: For clarification——purposes for clarification all of the area outside of the cantonment areas were considered range land, that is, if the land is not being utilized for some other purpose other than firing. Now, to the north of that limit of the range was the actual boundary, even though [30] not indicated by the Hacktern section, to the west likewise, south likewise. But I might also add for clarification, we know of problems that have been

(Testimony of Robert S. Jones.)

fought upon this area covered by Hacktern; however, they were with small infantry weapons and generally fired blank ammunition at each other, at opposing forces.

Mr. Bloom: Your Honor, please, I am going to offer this map as Plaintiff's Exhibit next in order.

The Court: So ordered. Is it the Captain's report, his survey report?

Mr. Bloom: No, that is the one that he has been looking at.

Mr. Scholz: His particular survey report, no, we have been unable to find it, but the Captain indicates that possibly it might be over in the engineer's.

The Witness: I am of the opinion, Your Honor, that the engineer's office, in all probability, still have that inasmuch as——

Mr. Scholz: Over in Sausalito?

The Witness: It was made at Camp Beal.

Q. (By Mr. Scholz): You mean at Sausalito, the Chief of Engineers?

A. I believe his designation is Chief, Northern California. District Engineer. I believe that is the designation.

Q. Over at Sausalito?

A. I am not certain. [31]

Q. I am pretty sure it is. If it is over there we could get it.

A. It might be indicated on the copy of that letter of transmittal incorporated there.

Mr. Scholz: Your Honor want to continue that

(Testimony of Robert S. Jones.)

matter, I would write over and ask if they had it there? If they don't—

Mr. Bloom: Well, we asked for it, there was an order for all this data. The Captain tells us he couldn't locate it, he thought he saw it go into the investigative file, but he doesn't know what happened to it, he gave it to the Chief Engineer, but they made inquiry, and there is a letter from the Attorney General, I mean, the United States Attorney's office in Washington to the effect that they made an examination and can't find it.

The Witness: There is some misunderstanding, I beg your pardon. I didn't intend to leave you with the impression that I thought the original report may have gone to the investigative—

Q. (By Mr. Bloom): You said a copy you thought.

A. A copy, it was possible the original that did go.

Mr. Bloom: I didn't understand that, but in any event I think it would serve no purpose to try to find that document.

The Clerk: Plaintiff's Exhibit 15 in evidence.

(Whereupon the map above referred to, marked Plaintiff's Exhibit 15, was received in evidence.)

The Court: Captain, at least in the light of your survey, [32] you did make a finding, the finding was conveyed to the proper officials, through channels as you indicated?

(Testimony of Robert S. Jones.)

The Witness: No, sir, the result of my survey conducted by me was made known to Colonel Griffith, Deputy Commander. That was simply for his information.

The Court: I see.

Mr. Scholz: The report is offered here, if Your Honor please, Defendant's Exhibit "D," that was a report of investigation for identification, I will offer that in evidence.

Mr. Bloom: If Your Honor please, glancing through this report I see that there is—it is replete with incompetent material.

The Court: No doubt containing a great deal of hearsay.

Mr. Bloom: Hearsay.

The Court: It may be marked for identification and incorporated in the record herein. The objection is sustained to the inclusion of the whole record.

Mr. Scholz: The only thing is that the plaintiff has used that in cross-examination and——

The Court: You may use such other parts on cross-examination as you desire, if it be relevant.

Mr. Scholz: Thank you, Your Honor, I will do that, not from this witness.

The Court: It has been developed now through the Captain that subsequent to the incident, the accident in question, that [33] certain reports were made to the Captain. Now, you might explain those in the light of the record, any other explanatory matter that might be pertinent or relevant.



(Testimony of Robert S. Jones.)

Mr. Scholz: I don't think there is anything that indicates any change from the Captain's testimony, Your Honor. I mean, it would be just corroboration.

The Court: No question. The information which he obtained after the accident was information that he had before the accident. I mean, you didn't have specific knowledge, but over-all knowledge, is that right?

The Witness: Yes, sir.

Mr. Scholz: He had some knowledge of some duds and that he also warned White of those duds.

The Court: Did you mention to Mr. White the survey that had been made, based upon a survey that you indicated?

A. I do not recall, Your Honor, whether I did or not.

The Court: Would the ordinary pedestrian, civilian pedestrian walking through the area in question cause or tend to cause any unexploded shell or missile to explode under ordinary course of events, just walking through there, by kicking of the toe or otherwise molesting or disturbing the unexploded missile?

The Witness: Yes, sir, that is very possible. In fact, vibration, ground vibration in some instances have been known to detonate duds. It might be brought out that many of these duds have been laying there for over two or three years [34] and throughout that time, throughout the period of oxidation they would become very much armed or

(Testimony of Robert S. Jones.)

dangerous, the slightest disturbance is liable to explode them. That is not true in the majority of cases, however.

Mr. Scholz: Does that apply to A.P.?

A. No, sir, armor piercing projectiles have no explosive charge whatsoever, normally, though some are designed, the secondary explosive charge is designed to make an initial penetration and to explode upon secondary impact or time detonation.

The Court: By the way, where is Sergeant Hodges? Is he in the service?

Mr. Scholz: He is out of the service, Your Honor.

The Court: What was his last known employment, do you know?

Mr. Scholz: I don't know, the last information I got, some little while before the trial, that he was in Lott, Texas.

The Court: What kind of business is he engaged in?

Mr. Scholz: Didn't say, traced him down there. He had been discharged from the service, located him in Lott, Texas.

The Court: Is it possible to get his testimony?

Mr. Scholz: Yes, Your Honor.

The Court: His testimony would be very material, very pertinent.

The Witness: Relative to Sergeant Hodges, sir, if I may suggest, my capacity was more of a supervisory capacity; he actually physically operated the ranges and of course, as you [35] brought out by

(Testimony of Robert S. Jones.)

testimony was physically associated with Mr. White during his operation.

The Court: I would like very much to have the benefit of his testimony in this case, would aid me materially. The Captain pointed out his functions were supervisory. If it could be obtained, could it be obtained in deposition form?

Mr. Bloom: May I state this:—

The Court: I think you made or stated you made a great effort—

Mr. Bloom: And I made requests, first on Mr. Deasy who was the Assistant United States Attorney then handling the case, respecting Sergeant Hodges. Whether I specifically requested his testimony of Mr. Scholz, I do not recall. But in any event, inquiry was made as to the location and availability and while I appreciate that certainly anything helpful to Your Honor should be produced, it would seem to me that the Government has had many years to develop this testimony and I think that under the circumstances, in view of the fact that the case has been pending for such a great length of time and efforts were made along those directions, that the Government has had sufficient time within which to produce the strongest case.

Mr. Scholz: Your Honor please, the Government shouldn't be fined for the shortcomings of Assistant United States Attorneys. However, in regard to that I endeavored to locate all the witnesses, and that I got in communication back on [36] April 28, 1950, I advised Mr. Bloom of the fact that I had a letter

(Testimony of Robert S. Jones.)

from the Attorney General furnishing me with the address of the witnesses and of all of the witnesses and I asked him his desire as to what he wanted to do, if he wanted to take a deposition or not. Well, there was one he wanted to take a deposition of, Lange, and we traced him down to Los Angeles and then he left there and traced him back to Philadelphia and we sent back a stipulation to take his deposition back in Philadelphia, but when he found out that he had left there——

Mr. Bloom: That is right, I am not criticizing.

Mr. Scholz: We have done all I could. Simply, this is not the only case that I am handling and I advised him where they were located and so forth.

Mr. Bloom: That is right.

Mr. Scholz: Now, I didn't—frankly, I didn't think Sergeant Hodges was going to be a necessary witness, because I have Captain Jones' statements and I have also Sergeant Hodges' statement and I thought that would be adverse to the plaintiff and that it wouldn't be necessary to use it. However, the testimony of Mr. White was somewhat different from the statement of Hodges and that, of course, took me somewhat by surprise.

Now, we can take his deposition if the Court desires to. It is our desire to give the Court the information the Court wants to adjudicate this case, take his deposition, either on interrogatories, in a very short time, or a regular deposition. [37]

Mr. Bloom: I personally feel, if Your Honor please, that at this late date, in view of the fact

(Testimony of Robert S. Jones.)

that the Government knew of the existence, even the address of this particular witness, I feel that it would be unfair to try and develop testimony at this time. In that connection, very probably it would have to be done by deposition, would entail additional expense, which my client can't afford and I honestly don't think his deposition would develop anything particularly enlightening to the case because we can assume that if it is something in the line of duty that he should have done, that Sergeant Hodges will undoubtedly say that he did it. I mean, that would be a natural thing for anybody to say.

Mr. Scholz: I don't think Government witnesses work that way, Your Honor. We are interested in giving the Court the benefit of all of the actual facts, even if the case is against us, we have no objection to losing it, but we are interested in the facts being presented to the Court. I think whenever the Government produces a witness we vouch for him.

Mr. Bloom: Well, I just don't like to see further delay.

The Court: Mr. Bloom was merely pointing out the natural inclination of a person to protect themselves. You have an affidavit from Hodges or any statement?

Mr. Scholz: Yes, Your Honor, we have a sworn affidavit. That is in the file, the investigation file, sworn affidavits from Hodges and sworn affidavits from White—Lange and White, [38] too. We offered those.

The Court: Have you a copy?

(Testimony of Robert S. Jones.)

Mr. Bloom: I have examined those affidavits over the weekend, your Honor.

The Court: My only thought is in the interest of the trial of the case, always has been my purpose to obtain testimony that might be material and relevant. It seems to me the first witness in this case is Sergeant Hodges. I mean, he is the man actually on the terrain, was with Mr. White, they had conversations. The gentleman on the stand, of course, exercises supervisory control and so testified in detail as to his duties and the discharge thereof; Hodges was the man on the turf, so to speak. He was certainly more intimate in connection with Mr. White than this gentleman. And in a trial of a case I always sought to produce the vital, material testimony.

Mr. Bloom: If Your Honor please, what I am primarily thinking of is a case between private litigants and that under the Federal Tort Claims Act, that is what the Act does, it places the Government in the position of a private corporation, as a private litigant, had full opportunity and in this case unusual opportunity, investigative and otherwise, to produce evidence which might be beneficial to them in a case which had been pending for years.

The Court: Pardon me, Counsel, how long has this case been pending now? [39]

Mr. Bloom: About three years, now, I think, Your Honor. Three years. You see, it was originally designated as one of your cases and then thereafter the American Can litigation came up.

(Testimony of Robert S. Jones.)

The Court: That took me a year to try.

Mr. Bloom: Yes, and then it was put on Judge Lemmon. Judge Lemmon was endeavoring to assist with the calendar, it was continued on a number of occasions, four or five occasions, before Mr. Scholz got into the case, and then I believe Your Honor thereafter was—I think it was the Bridges' litigation thereafter that prevented it being heard, and as a consequence——

The Court: The other judges were trying cases here, Mr. Scholz; why is it this case came back here after this number of years?

Mr. Scholz: Your Honor, I didn't get this case until after Mr. Deasy resigned and then it came to me with about forty other cases, and I don't know.

The Court: Under the circumstances——

Mr. Scholz: Set for trial many times.

The Court: Well, under the circumstances then we will have to stand content on the record as it exists.

Mr. Scholz: That is all. Your Honor have any more questions you wish to ask?

The Court: No, sir.

Mr. Scholz: That is all. [40]

(Witness excused.)

Mr. Scholz: Your Honor please, I would like to ask Mr. White a few questions as an adverse witness.

## JOHN PHILLIP WHITE,

the plaintiff in this action, called as an adverse witness on behalf of the Defendant, previously sworn.

The Clerk: You have heretofore been sworn and you are still under oath.

## Direct Examination

By Mr. Scholz:

Q. Mr. White, when you were discharged from the Air Corps do you recall what your discharge certificate said?

Mr. Bloom: If Your Honor please,—

A. I don't recall.

Mr. Bloom: Just a moment.

The Court: What is the purpose?

Mr. Bloom: I can't see what purpose or relevancy it has unless you are trying to inject some collateral extraneous matter into the case. I don't know what he has reference to, even.

The Court: Can't see the relevancy.

Mr. Scholz: All right, Your Honor.

Q. Would the same apply if I asked him as to his discharge as a Seabee?

Mr. Bloom: Same objection. [41]

Mr. Scholz: The purpose, of course, is to show that he had knowledge of demolition. Now, I don't suppose he will say it.

The Court: Counsel, perhaps I am obtuse on this subject, but the question, what is the question?

(The question was read by the Reporter.)

The Court: As to what? Reasons for discharge?



(Testimony of John Phillip White.)

Mr. Scholz: No, the purpose, of course,—it is no good now—the purpose was, on these discharges, Your Honor, if they had particular qualifications they are listed, at least that is my understanding. I know it is in the Army.

The Court: If that be the purpose, certainly. If the discharge will show any particular qualification that may be relevant or material to his knowledge of demolition or high explosives. I will allow it.

Mr. Scholz: I don't know, that is what I might ask——

The Court: Ask him if he was honorably discharged or otherwise.

Mr. Scholz: Oh, no, I am not interested in that. Strike the question, because I know what the answer is going to be from the smile on the plaintiff's face.

Q. Have you got a copy of the Seabee's discharge there?

A. I have copies of both discharges.

Q. The Seabees may be different than the Army. I will pass that question for a minute and ask you a couple of other questions. Now, I believe you testified your contract permitted [42] you—where you were to work, is that correct?

A. Yes, the contract permitted me.

Q. And then when you decided, you went over to the M. P. barracks and procured the services of two or three men over there, is that correct?

A. Before going to work I secured the services of some of these men from the M. P. barracks.

(Testimony of John Phillip White.)

Q. And one of those was a Private Lange, do you recall?      A. Yes.

Q. And now when you took them out did you tell them not to pick up any duds?

A. Yes. May I explain it—

The Court: Answer it in any way you wish.

The Witness: I explained to them that all I wanted was brass, to leave everything else alone.

Q. Yes. Now, referring to the affidavit of Lange in Defendant's Exhibit "D" for identification, he states that—

Mr. Bloom: Your Honor please, I believe that this is an improper use of hearsay evidence.

Mr. Scholz: I want to ask him if that is true.

Mr. Bloom: I still think it is improper, using hearsay evidence.

The Court: It is, yes; sustained.

Q. Then you told them also that they were not to pick up any iron, but all you were interested in was brass, is that correct? [43]

A. That is true.

Mr. Scholz: That is all. One more question. Your Honor, please, the interrogatories are here, I believe.

The Court: They should be on file, Counsel. I looked for them, will have them filed. The interrogatories, the answers, they are not in the file.

Mr. Bloom: The originals, they are not, your Honor.

The Court: I would like to have them on file.

Mr. Scholz: I don't know where they are.

(Testimony of John Phillip White.)

The Court: You can determine that——

Mr. Scholz: That is before I came into the case.

The Court: Mr. Clerk, will you make a note to be sure the originals are on file? Also, all these exhibits, including those for identification.

Mr. Scholz: Then those interrogatories will be read by your Honor, then?

The Court: Yes.

Mr. Scholz: One more question on that ground.

Q. In the interrogatories of Captain Petrie, he says, "I advised the plaintiff personally——"

Mr. Bloom: If your Honor please, I object to that on the grounds it is improper hearsay evidence. The fact that it is contained in the answers to the interrogatories doesn't render it any more competent as evidence.

The Court: This might be leading to a question. Let me [44] hear whatever it is.

Mr. Scholz: As I understand it, the interrogatories are in evidence.

Mr. Bloom: Interrogatories should be on file, not in evidence.

Mr. Scholz: Well, I will offer them in evidence now.

Mr. Bloom: Then I will object to their introduction.

Mr. Scholz: Should the Court rule on that?

The Court: You are offering a non-existent document; there is nothing before the Court.

Mr. Scholz: I will——

The Court: This record may be reviewed here-

(Testimony of John Phillip White.)

after and our great brethren in the Appellate Court are sometimes meticulous in their examination of our records and wonder sometimes what happens in the trial courts. Sometimes I think they wonder about our ineptitudes.

Mr. Scholz: Well, then, your Honor——

The Court: You see, I have to protect myself, not only against the Court of Appeals, but counsel as well and opposing counsel, and I am a hounded man, a hounded man.

Mr. Scholz: I appreciate your Honor's attitude, because I was in the Appellate Court this morning. I want to say this, your Honor: When and if the interrogatories are found, that if they are not found I have sworn copies here and I may offer them in evidence in lieu of the originals. [45]

The Court: Interrogatories of this gentleman?

Mr. Scholz: Interrogatories of Captain Petrie and Captain Jones.

Mr. Bloom: To which I object on the ground that the interrogatories should be on file, that they are not evidence as such, and that if they contain hearsay and they are offered in evidence, that it is proper to object on the ground. I don't think you waive any of those objections on the fact that answers come in by way of proposed answers to interrogatories.

Mr. Scholz: That is correct.

The Court: That is true. Counsel has indicated his objection and I may interpose that you couldn't offer the interrogatories wholesale just by the bland

(Testimony of John Phillip White.)

assertion that here are the interrogatories and answers; you couldn't offer them wholesale.

Mr. Scholz: Well, I would say this: These interrogatories were put on the request of the plaintiff and the witnesses in here—it is actually testimony and sworn statements and they are like a deposition, and in view of the fact that Captain Petrie is not here, it is a deposition, and is offered as admissible in evidence, and I offer——

The Court: Let us pause a moment, Mr. Scholz. You were addressing a question to this witness based upon an answer in Captain Petrie's interrogatory?

Mr. Scholz: That is right. [46]

The Court: Where are the originals of these documents, do you know?

Mr. Scholz: Well, I assume that they were filed, that they were filed with the Court.

The Court: Mr. Clerk, are they on file, any of these documents?

(Discussion between the Court and Clerk out of the hearing of the Reporter.)

The Court: I think what we better do is get the originals; they must be in existence. This matter may then remain open until you make the formal offer of these interrogatories, and make our record on it. I wouldn't want to have them submitted in this form.

Mr. Scholz: I think your Honor is right.

(Testimony of John Phillip White.)

The Court: You'll find them probably in the files in your office some place.

Mr. Scholz: Let it remain open until I find it and I will offer them in court.

Now, back to my original question. I was about to ask Mr. White a question based on the statement of Captain Petrie in his answer to the interrogatories propounded to Captain Petrie by the plaintiff himself, and if there is no objection I would like to ask him that question.

Q. In the interrogatories of Captain Petrie, which were propounded to him by yourself, Mr. White, he states in answer [47] to interrogatory 12 he advised the plaintiff personally—the plaintiff was advised that if he did find a dud he wasn't to touch it, but to mark it and someone from the disposal team would dispose of it. And now, did Captain Petrie make that statement to you?

A. Not in regard to the strafing range.

Q. Did he make the statement to you?

Mr. Bloom: If your Honor please, I am going to object for the record to the use of these interrogatories in this manner. In other words, he is now endeavoring to elicit testimony from this witness——

The Court: Rephrase the question. Mr. Witness, Mr. Scholz has asked the question whether or not Captain Petrie did make such a statement to him.

Q. (By Mr. Scholz): Did Captain Petrie ever make such a statement to you that if you found a dud you were not to touch it, but to mark it and

(Testimony of John Phillip White.)

someone from the disposal team would dispose of it?

A. He did not make such a statement in regard to the strafing range. He may have made such a statement at that time when I was considering investigating the artillery ranges; I do not recall. I was with that—I was concerned, I remember, for those areas which I decided. Those I wasn't concerned with, like anyone else, I made no effort to remember such.

Q. Did Captain Petrie state to you, did you state to Captain [48] Petrie, rather, that you were an ex-service man?

Mr. Bloom: If your Honor please, I think—

Mr. Scholz: This is cross-examination.

Mr. Bloom: Yes. I think it is improper use of interrogatories. Speaking about interrogatories, there is no evidence, if your Honor please, concerning what statements were made by Captain Petrie.

The Court: Overruled; he is entitled to ask the question on cross-examination.

Mr. Scholz: Will you read the question?

(The question was read by the Reporter.)

A. I probably did, but I don't recall it.

Q. And you did tell him that you were fully qualified to identify and properly mark duds?

A. I did not.

Q. But you did go out and mark a dud, you stated? A. I did mark a dud.

Q. And you also stated that that was the—they complimented you on the marking of your dud?

(Testimony of John Phillip White.)

Mr. Bloom: He said he did not.

Q. (By Mr. Scholz): You did not mark a dud?

A. I say I did mark a dud.

Mr. Bloom: I beg your pardon.

Q. (By Mr. Scholz): And you also stated that they complimented you upon the fact that you marked it so well, or words to that [49] effect?

A. I don't remember anyone complimenting me on the matter, if anyone did. The dud was already marked to a certain extent, but I was having people work out there and I marked it better.

Q. Well, when was that you marked the dud?

A. I would say it was either on the afternoon of November 18 or the morning of November 19.

Q. Now, you had worked in other, you had cleaned up other ranges, had you not?

A. Would you specify, Counsel?

Q. No. Well, you had cleaned up other ranges, have you not? You know what I mean by a range?

A. You mean ever in my life?

Q. Where people fire guns—guns——?

A. Yes, I have; I had at that time recovered bullet metals from target butts previously.

Q. And you told Captain Petrie that you had done so, did you not?

A. I don't recall; it is quite possible I did, but——

Mr. Scholz: That is all.

Mr. Bloom: No questions.

The Court: What, if any distinction, Mr. White, did you make in this matter between the artillery



(Testimony of John Phillip White.)

range and the strafing range with respect to the subject of hazards existing thereon?

A. To me artillery is large caliber guns which shoot explosives. [50] A strafing range—I have seen strafing and I have been the object of some strafing; I have seen strafing practice. That strafing is done with machine gun, machine guns and mounted in airplanes. To the best of my knowledge they don't even use any tracers when strafing, just a method of shooting at personnel with bullets, and so on, faster than with a rifle. Further, the strafing range wasn't, to my understanding, an artillery range, because the difference in size—what I mean, a 50 caliber, is my understanding about the heaviest caliber that they use for strafing and fires just a solid bullet.

The Court: What is the caliber of the missile in question in which you were unfortunately injured?

A. I believe it was a 37 millimeter.

Q. Is that the type ordinarily used in strafing?

A. No, sir; a 37 millimeter—refers to the diameter. A 50 caliber, I don't just know how much an inch it is, but a 50 caliber is about so long (indicating), with a bullet about as big as the joint of your small finger. And that is what is normally used in strafing. And so the strafing range does not appear to me to be an artillery range.

Q. What kind of material were you getting there in that range?

A. The brass. While the Army normally seems to police the brass in the firing line, when you're

(Testimony of John Phillip White.)

practicing, why, you have to pick up the empty cartridges. The airplane gunner can't pick up the cartridges and it was the empty brass cartridges which [51] had already been fired, which had already expelled its bullet, just the empty brass cartridge what I was looking for.

Q. Yes. Other than the missile in question which injured you on the day in question, did you find any other missiles of like caliber during the course of your investigation and collection of material?

A. I had not found any, although I had been sort of looking for them, because the Sergeant had told me that these antitank projectiles, I would likely find some of them on there, but——

Q. You were not looking for them, were you?

A. I didn't want to collect them and I wasn't actually looking for them. If I had found some I would not have been surprised in view of the fact the Sergeant had told me that some of them would be there.

Q. Well, this particular instrumentality that injured you was an antitank projectile?

A. I thought it was up to the moment it exploded.

Q. And that thinking on your part was the result of observation while you held it in your hand; is that so?

A. No, sir; while Lange held it in his hand.

Q. So you made your observation when Lange had it in his hand?

A. Yes, sir. He had picked it up and called my

(Testimony of John Phillip White.)

attention to it and held it in such a manner, and that was when I thought it was just one of those things that Sergeant Hodges had told [52] me I would find there.

Q. Can you assign to me any reason why Lange should toss that to you?

A. No, sir, I can't. I specifically told him that I was not looking for it, that I was interested in the brass. I can assign no reason whatsoever for his pitching it to me.

The Court: All right. I have no further questions.

### Redirect Examination

By Mr. Scholz:

Q. You received a standard admonition from Captain Jones and Sergeant Hodges about staying away from duds——

Mr. Bloom: What is the question?

Q. (By Mr. Scholz): You received a standard admonition about staying away from duds, did you not?

Mr. Bloom: I will object to that as calling for a conclusion of the witness.

Mr. Scholz: That is his own statement.

Mr. Bloom: Standard admonition?

Mr. Scholz: Well, that is exactly the words he used. I quote it and it is on page 77 of the Reporter's notes.

The Court: Overruled.

Q. (By Mr. Scholz): You received an admoni-

(Testimony of John Phillip White.)

tion about the staying away from duds from Captain Jones and Sergeant Hodges, did you not?

A. I don't recall; I probably did. [53]

Mr. Scholz: That is all.

Mr. Bloom: May I have the question and answer read?

(The question was read by the Reporter.)

The Court: Is that all now for Mr. White?

Mr. Bloom: Yes, your Honor.

Mr. Scholz: That is all.

The Court: The case is submitted on the evidence?

Mr. Bloom: Yes, your Honor.

The Court: Save and *accept* the introduction or proffer in evidence of the interrogatories when and if they are found.

Mr. Bloom: Yes.

Mr. Scholz: I think all the exhibits are in. Oh, yes, one more.

The Court: Mr. McGee, will you collect all the exhibits, including those marked for identification, so that we will have a complete file?

Mr. Scholz: Your Honor, please, your Honor asked some questions of Captain Jones and I have here a circular from the Chief of Engineers.

(Discussion between the Clerk and Court.)

Mr. Scholz: If your Honor please, I have here a circular from the offices of the Chief of Engineers, dated 6 November, 1946, which I believe answers some of your Honor's questions in regard

to disposal, and I offer that in evidence, if Your Honor please, as Defendant's exhibit next in [54] order.

The Clerk: Defendant's Exhibit "F."

Mr. Scholz: That is an amendment to the circular, is it?

Mr. Bloom: I believe it is; that was the subject of request for documents, but I have no objection to the thing.

The Court: All right, it may be marked.

(Whereupon the document above referred to, marked the Defendant's Exhibit "F," was received in evidence.)

Mr. Bloom: Now, if your Honor please, I was wondering if your Honor would like to hear some argument?

The Court: Yes.

Mr. Bloom: If so, I am ready to proceed.

The Court: I would like to hear some discussion on the matter and probably after the discussion you might have a very short brief on the matter from both sides.

Mr. Bloom: Very well.

The Court: I would like to have some law on it, too.

Mr. Scholz: If your Honor please, may we continue this matter, too, until we see about those interrogatories and then complete the case and then have the case submitted, and then if you Honor wishes oral argument—

The Court: I would like some discussion on the

subject, Counsel. And it is now 4:00 o'clock, approximately. I am willing to hear it some afternoon immediately; I don't want too much time to elapse. I am trying a case in the morning; say immediately after that criminal case is over. Mr. McGee [55] will advise counsel.

Mr. Bloom: Very well, your Honor.

The Court: Have an afternoon set aside, an hour or so, and then you look in the exhibits; find if you have the interrogatories, and if you haven't them, of course, that is another matter, they are lost. Do the best you can. I realize the burden is on you, Mr. Scholz.

Mr. Scholz: It wasn't my case originally.

Mr. Bloom: Possibly tomorrow afternoon?

The Court: I am starting a criminal case in the morning, Mr. McGee.

The Clerk: Yes, your Honor.

The Court: Probably be a couple of days on that.

Mr. Bloom: Your Honor doesn't wish to hear any discussion at this time?

The Court: It is 4:00 o'clock; might as well discontinue. Might collect some law on the subject, whatever law there is.

Mr. Scholz: I have a couple of cases. I don't know how close it is, but there is a couple of cases.

The Court: No doubt there will be some briefing.

Mr. Bloom: Yes, I have quite a bit of authority, if your Honor please.

The Court: All right.

Mr. Bloom: Some of them I would like to call to his Honor's attention in our argument. [56]

The Court: Give me the cases now; I will—probably better reserve the cases until I hear about it.

Then this matter will be regularly continued on the case of White, on John Phillip White versus the United States of America, will stand regularly continued until a date—have to give it a day certain—let us put it down for Friday afternoon, Friday afternoon at 2:00 o'clock.

The Clerk: November 10, at 2:00 p.m.

The Court: Subject to be reset or otherwise continued in the event I have not completed the criminal case which is about to go forward; at that time hear the oral argument and any law you have on the subject. [57]

Wednesday, July 11, 1951

The Clerk: White vs. United States, on trial.

Mr. Bloom: Ready for the plaintiff.

Mr. Scholz: Ready for the defendant.

Mr. Bloom: Your Honor, you will recall that this matter is reopened for the limited question of damages and for the purpose of throwing further light on the present condition of the plaintiff with respect to damages.

Now there was filed in this matter, if your Honor please, a claim of lien on behalf of the Industrial Indemnity Company in the sum of \$4,438.54. At this time, with your Honor's permission, we would like to file a supplemental claim of lien for expendi-

tures, medical expenditures made by the carrier since the last hearing in November. In that connection I have shown Mr. Scholz receipted bills.

Mr. Scholz: Well, I didn't examine them. You showed them to me, but I didn't examine them.

Mr. Bloom: Yes. Would you care to examine these? These are from St. Mary's Hospital and Dr. Edmund Morrissey.

Mr. Scholz: Have they been paid?

Mr. Bloom: They have been paid.

Mr. Scholz: By the Industrial Indemnity Insurance Company?

Mr. Bloom: That's correct. [2\*]

Mr. Scholz: They appear to be right in order.

Mr. Bloom: I am going to ask if you will stipulate that these expenses were incurred on behalf of the plaintiff, and that they are reasonable in amount and have been paid in the same manner as you stipulated before on the medical, in the same manner as you stipulated before on the medical.

Mr. Scholz: They appear to be in reasonable amount and I personally have no question but that they are correct bills and that they have been presented. I will certainly take Mr. Bloom's word that they have been paid, although some of them are not marked paid. May I ask you, Mr. Bloom, do you know personally if these are the bills rendered by the concerns indicated?

Mr. Bloom: Yes, I do; and they are the subject

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\*Page numbering appearing at top of page of original Reporter's Transcript of Record.



matter of this supplemental claim of lien which is verified by an officer of the company.

Mr. Scholz: Yes. In that case, I have no objection, your Honor.

Mr. Bloom: You will so stipulate, then?

Mr. Scholz: I have no objection to it being offered in evidence and I will stipulate that they are reasonable value.

Mr. Bloom: Thank you. With your Honor's permission, I ask leave to file this supplemental claim of lien.

Mr. Scholz: No objection, with the supplemental claim of lien, your Honor. Mr. Bloom has hitherto filed a claim of [3] lien, but it was my opinion that the insurance company should come into Court. I am not too positive on that, and I thought they should file suit on it. I just merely advised the Court of my idea on it. I also advised the Court at the time they filed the original claim of lien, and I think the Court overruled me, rather properly. Outside of that, I have no objection.

The Court: The supplemental claim of lien may be filed herein.

Mr. Bloom: Now, if your Honor please, I have shown counsel a proposed second amended complaint, which we now offer for filing. This complaint is merely designed to conform to proof which was adduced at the trial and to clarify the damages for the amount, the amount of damages and the exact nature of damages sought, and also to provide for the expenditures which have been made since the time of trial. Otherwise, it conforms to

the nature and allegations of the original complaint in the first amended complaint. I now offer for filing this second amended complaint.

Mr. Scholz: If your Honor please, I have just received this second amended complaint and I don't see that it serves any purpose. It apparently is the same as heretofore filed, except it increases the damage from \$60,000 odd, isn't it?

Mr. Bloom: Yes.

Mr. Scholz: To \$63,881.19, and I don't see any reason [4] for filing the same.

Mr. Bloom: Well, in respect to the augmented damages, if your Honor please, that will be the subject of discussion, I presume, at the conclusion of the evidence here. But basically the complaint——

The Court: I notice in paragraph 6 that you have——

Mr. Bloom: Yes, your Honor, that is one of the changes. That is amended to conform to the proof and is in accord with the medical testimony of Dr. Morrissey and of the plaintiff, and I think is a more accurate description of the injuries sustained than is contained in the original complaint. That really is the only purpose of it. And all of the specifications in that paragraph, if your Honor please, find support in the transcript of the trial.

The Court: Paragraph 10 sets forth the items of \$946.93 for the physicians and surgeons, \$2,319.26 for hospitalization, including drugs and medication and X-rays.

Mr. Bloom: Yes. Now in that connection, if

your Honor please, those sums are now the subject of the two stipulations which have been entered and have been broken down and made accurate in amount.

The Court: \$115 for the man's services?

Mr. Bloom: Yes, and that is also the subject of a stipulation, being one of the expenditures of the Industrial Indemnity. [5]

The Court: Now the loss of compensation provided for in paragraph 8—

Mr. Bloom: That, your Honor, is in amount and in nature the—exactly the same as in the original complaint. The only difference is that we have added two sentences there to show, as the evidence showed, that there was augmented earnings for a period. For example, on page 3, on line 20, we have added this sentence to conform to proof, "That thereafter the plaintiff's earnings from said employment were approximately \$400 per month," rather than the \$250 which were his earnings at the time of the accident. And then we have added on line 25 the sentence, "Subsequently his earnings from said employment were approximately \$600 to \$700 per month." Also, to conform to proof. But as to the amount sought, that has been left precisely in the original condition.

The Court: Well, may the answer on file as embodied in that answer on behalf of the United States of America be deemed the answer to the second amended complaint?

Mr. Bloom: Certainly, your Honor.

The Court: Counsel for the Government, the

answer on file may be deemed to be the answer to this second amended complaint.

Mr. Scholz: I was going to say, your Honor, that of course we have had no time to plead to it. We just received it. But I don't think the answer on file would cover those [6] other allegations. If your Honor is going to admit that, I would think that the best thing to do would be to stipulate that all the matter contained therein is denied.

Mr. Bloom: That is satisfactory.

The Court: Save and except such items as may have been stipulated to.

Mr. Scholz: That's right, or admitted in the original answer.

The Court: Well, I think you had better file a written stipulation on that.

Mr. Bloom: Very well.

The Court: Now do you intend to offer proof at this juncture with respect to damages?

Mr. Bloom: Yes, your Honor. I will have two witnesses, short witnesses; Dr. Morrissey will be here, and the plaintiff. With your Honor's permission I would like to put Dr. Morrissey on the stand.

The Court: Call the Doctor.

### EDMUND J. MORRISSEY

called on behalf of the plaintiff; sworn.

The Clerk: Please state your name, your address and your professional calling to the Court.

A. Edmund J. Morrissey, 450 Sutter Street, physician and surgeon. [7]

(Testimony of Edmund J. Morrissey.)

Direct Examination

By Mr. Bloom:

Q. Dr. Morrissey, the plaintiff in this matter, John Philip White, has continued to be under your care and supervision since the time of your testimony in November in this case; is that true?

A. He has reported occasionally at the office for check-up examinations, and on one or two occasions has been confined to the hospital.

Q. Would you please tell the Court what the nature and extent of your treatment of Mr. White has been since the trial?

A. Well, the only treatment as far as hospitalization is concerned is this ulcerated area on the lateral surface of his left foot. That has a tendency to become infected, and when it does, we hospitalize him and keep the foot in absolute rest and hot compresses, and give him antibiotics, usually penicillin.

Q. He has been so hospitalized, has he not, on two occasions since your testimony in November of last year?

A. Yes, he was hospitalized for a few days in November and in April of this year.

Q. And what hospitals? Do you recall what hospitals he was confined in?

A. I know the last time he was confined to St. Mary's Hospital. [8]

Q. And Mr. White reported to you for observation as recently as what date?

A. A few days ago.

(Testimony of Edmund J. Morrissey.)

Q. Now in examining and treating Mr. White as you have just described, did you find that his condition was more or less the same as you testified to in November of last year?

A. His findings suggested the same, except for these occasional exacerbations that he has.

Q. I see. Now in that connection you will recall that you testified in November of last year that in your judgment the recurrence of the breakdown of this trophic ulceration and the condition of this lower extremity, his left extremity, was a permanent injury and that it was likely to recurrently break down. Now your observation of the patient since November of last year; has it verified your diagnosis in that regard?           A. Yes.

Q. And you adhere, do you, to your testimony; that is, to your prediction as to the prognosis and future disability of the patient?

A. The only thing I can state is that these trophic ulcerated areas have a tendency to break down and require treatment from time to time.

Q. Now, Doctor, in that connection, this ulcerated area of White's, the ulcers are rather deep; is that not so? [9]           A. Well, it is fairly deep.

Q. In cases of this kind and from your past experience, would you say that there is a possibility of infection or bone involvement in a case of this nature?

A. Well, there is a possibility in any trophic ulceration of this type that the infection may spread into the deep tissues of the foot and into the bone.

(Testimony of Edmund J. Morrissey.)

Q. I see. In the event that it would so spread, amputation of some kind would be called for, would it not?      A. Well, there is that possibility.

Q. Now in connection with White's condition and what you have seen of him, could you tell us in your opinion what expense this man is likely to incur by way of hospitalization and medical treatment in the years to come? How much per year, would you say?

Mr. Scholz: I think that that is objectionable, your Honor; I think it is too remote and no proper basis for it. Objection is made on that ground.

Mr. Bloom: I will ask the Doctor the question in a different form.

Q. (By Mr. Bloom): How many days per year would you say the patient is likely to be immobilized or to require hospitalization in the future?

A. How many——?

Q. How many days per year? [10]

A. That is awfully hard to say. I would say that you could probably plan on two weeks a year.

Q. What would you say would be the likely costs of medical and hospitalization per year in the future?

A. Oh, it would run between probably \$500 and a thousand.

Q. \$500 to a \$1,000?      A. Yes.

Mr. Bloom: I think that's all. Thank you.

(Testimony of Edmund J. Morrissey.)

Cross-Examination

By Mr. Scholz:

Q. Doctor, has Mr. White been completely healed from any disability incurred in this accident outside of the trophic ulceration?

A. I think that his chief disability is that, yes. He has some sensory changes over the lateral surface of the foot, but I don't think that is too important, except in its relation to the trophic ulceration.

Q. And because of that trophic ulceration, you anticipate that, as best you know, he will possibly be disabled for about approximately two weeks a year?

A. Yes. It depends entirely on how much he is on his feet and so forth, but in the past it has been averaging that, I think.

Mr. Scholz: That's all, Doctor.

Redirect Examination

By Mr. Bloom:

Q. One question only, Doctor. You also [11] recall you testified, or rather you observed or found that the patient had a shortened toe or great toe of the right foot. You recall that condition and you recall that your testimony was that that situation or condition resulted in a permanent disability. That is true, is it not?

A. I think its shortness is permanent, yes.



(Testimony of Edmund J. Morrissey.)

Recross-Examination

By Mr. Scholz:

Q. That has—has that any disabling result; does that have a disability rating? I mean, would that interfere in any way?

A. If this was before the Industrial Accident Commission, he would probably get something for it.

Mr. Scholz: That's all.

Mr. Bloom: Thank you, Doctor.

(Witness excused.)

Mr. Bloom: Mr. White, please.

JOHN PHILIP WHITE

called in his own behalf; sworn.

The Clerk: Please state your name, your address and your occupation to the Court.

A. John Philip White, four Third Street, Sausalito. Metal business.

Direct Examination

By Mr. Bloom:

Q. Mr. White, since the time of the trial when you testified in this matter in November of 1950, last [12] year, have you required further hospitalization or medical treatment on account of the injuries you sustained? A. I have.

Q. Now when did you first require such attention since the trial?

A. On November 11th, I believe. It was November 11th.

(Testimony of John Philip White.)

Q. Where were you sent?

A. St. Mary's Hospital.

Q. Was that under Dr. Morrissey's supervision?

A. Yes.

Q. How long were you in the hospital?

A. Three days.

Q. What was the reason for your being confined to the hospital?

A. The ulcer on my foot flared up and I was unable to walk.

Q. When you came out of the hospital, were you using crutches again or other mechanical aid?

A. Well, I got out of the hospital only on the promise that I would stay in bed for three days at home. They didn't feel that penicillin was necessary any more, but they didn't want me to stay—they wanted me to stay off the foot. And then after spending three days at home in bed, I was on crutches for about ten days, I believe.

Q. All right. Now thereafter what was the second occasion on which you required further treatment? [13]

A. In the last week in April, I was sent to St. Mary's Hospital.

Q. How long were you there this time?

A. One week.

Q. What treatment, if any, was given you then?

A. I was given penicillin every three hours and my left foot was put in hot compresses every two hours for five days.

Q. When you left the hospital, were you using

(Testimony of John Philip White.)

or compelled or required to use crutches or a cane?

A. I left on a Thursday and I used crutches then for ten days until I reported to the doctor again on the Monday following, the next week.

Q. All right. Now were there any other occasions since the trial when you required further hospitalization or medical treatment?

A. I have not required any additional hospitalization. However, I have had momentary flare-ups of my foot, in which case I have stayed at home and stayed off of it.

Q. Now you recall, do you, your testimony as to your physical condition as of the time of trial; namely, November of 1950? Do you recall the testimony that you gave at that time?

A. I think so.

Q. Would you say that your condition is any different? Is it better or is it worse or is it approximately the same as of the time of trial? [14]

A. I think it is approximately the same.

Q. Would you say that the symptoms which you described in detail, the manner in which these injuries affected you and manifested themselves, were more or less the same now as they were then?

A. There has been no change.

Q. Would you briefly describe, then, what those symptoms are as of today?

A. Well, I have the permanent sensation of having my foot slightly twisted out of shape, and as though it were in a small shoe, and there's a lack of sensitivity on the bottom of the foot. There's

(Testimony of John Philip White.)

a couple of areas of hypersensitivity. Periodically the foot grows warmer and the whole feeling intensifies, in which case I go to the doctor and the doctor either tells me to go home and go to bed or he tells me, "Go to the hospital." That's all.

Q. Would you say that this disability in your lower extremities affects or influences your activities and your work in the manner that you described in November of 1950?

A. Yes, it still has the same effect. I am limited as to the amount of time I can stand or how far I can walk. It affects how I spend my free time. That is the same; it has the same effect as it had last November.

Q. Now you recall you testified in November that your recreational activity, such as bowling, climbing and walking, [15] which you had been accustomed to do, had to be eliminated. Is that true now?

A. That is still true.

Q. And you testified that these disabilities affected your business or occupation in that it didn't permit you to get around and contact clients or customers in the way you did. Is that true now?

Mr. Scholz: If your Honor please, I believe that Mr. Bloom is leading the witness. I think he should ask him.

Mr. Bloom: Well, it is leading, I know.

Mr. Scholz: I object to it on that ground.

The Court: Overruled.

Q. (By Mr. Bloom): Is that substantially the same; is that true now?

(Testimony of John Philip White.)

A. That is substantially the same.

Q. You have more or less the same interference with your occupation?

The Court: Has there been any impairment of earning capacity?

Mr. Bloom: Well, the testimony heretofore, your Honor, has been that, first of all, the loss of wages occurred on three occasions and also there is testimony in the record of permanent loss of earning capacity to a certain extent, in that the plaintiff is unable to, in the metal business where he had to contact many customers, get out in the field. [16] He no longer could do that, and the testimony showed that his earnings and his commissions at the later date dropped on account of it. So I assume that the record——

The Court: There is testimony to that extent?

Mr. Bloom: Yes, your Honor.

The Court: What is his present occupation?

Q. (By Mr. Bloom): Well, what is your present occupation?

A. I purchase waste materials from industrial plants. These waste materials are processed by a firm with whom I have an arrangement to process the materials, where I confine myself to the buying of them.

Q. Then you have changed your mode of activity to a certain extent since November of 1950; is that right?

Mr. Scholz: I object to that on the ground it is leading and suggestive.

(Testimony of John Philip White.)

The Court: Overruled.

A. No, I have not essentially changed my occupation since November, 1950.

Q. (By Mr. Bloom): I didn't say your occupation; I said your mode of activity. You were a salesman before, were you not?

A. Not in November of 1950.

Q. Well——

A. Since I have been in business for myself, there was a time when I operated a plant. I no longer operate a plant. My activities and my business are confined strictly to the [17] buying. Now in the inability to operate a plant, that is perhaps a change in occupation, although it is more a severing of a function of the business.

Q. Well, would you have the same difficulty in contacting customers and getting around in the field as you previously described?

A. I would have difficulty seeing a large number of people. I confine myself now to seeing a relatively few larger accounts.

Q. I see.

Mr. Scholz: I object to that on the ground it calls for his conclusion.

The Court: Overruled.

Q. (By Mr. Bloom): By the way, Mr. White, what is your birth date?

A. January 22nd, 1911.

Q. One question I don't think was perhaps completely covered before. Prior to the date of this accident, November of 1946, what was your general condition of health?

(Testimony of John Philip White.)

A. I was quite healthy.

Q. And what was the condition specifically of your lower extremities? A. Excellent.

Q. Both feet and legs normal in every respect?

A. Yes. [18]

Q. Particularly in reference to the left foot, that was completely normal? A. Yes.

Q. You engaged in hiking, bowling and other forms of exercise? A. I did.

Mr. Bloom: That's all.

#### Cross-Examination

By Mr. Scholz:

Q. Mr. White, what is your average earnings now?

A. That is rather difficult to say, Mr. Scholz. In the change, the reorganization of my business, and in the condition of the metal markets right now, it has been impossible to draw up any balance sheet for this year's activities which would show any true picture. In general, my business is good.

Mr. Scholz: That's all.

The Court: Counsel for the plaintiff, have you heretofore offered testimony in support of the allegations of paragraph 8 with respect to the loss of earnings, with more particular reference to the matter contained therein?

Mr. Bloom: Yes. If your Honor please, that is—

The Court: There is one item of a thousand dollars.

(Testimony of John Philip White.)

Mr. Bloom: Yes.

The Court: Another item of \$1,400, and another item of \$2,300. [19]

Mr. Bloom: Yes, that has been testified to, if your Honor please, and no contradictory testimony offered.

The Court: Now subsequent to the hearing, has there been any other loss of earnings, according to the records kept by this man?

Mr. Bloom: Well, we have made no tender of proof of any specific loss of earnings, because of his changed business. It is impossible for us even to calculate it.

The Court: And one further question. To what extent were payments made to the plaintiff herein under the Workmen's Compensation?

Mr. Bloom: Well, for your Honor's information—and that is the subject of the original claim of lien—

The Court: And that was how much?

Mr. Bloom: Filed by the Industrial Indemnity Company, that shows temporary disability payments of \$1,271.50.

The Court: \$1,271.50. And what are the other items included? Medical expense?

Mr. Bloom: The other is the medical, if your Honor please.

The Court: What was the total medical?

Mr. Bloom: Well, the record—

The Court: The original claim or lien was in excess of \$4,000?



(Testimony of John Philip White.)

Mr. Bloom: That's correct, your Honor. [20]

The Court: I just want the items for my own record.

Mr. Bloom: Yes. And I will give you my——

The Court: He was given a temporary rating, was he?

Mr. Bloom: No permanent rating. Just temporary disability.

The Court: Well, according to Dr. Morrissey, this man has a permanent disability.

Mr. Bloom: Oh, yes, but in view of the fact that this action was pending, there was no necessity to carry it through to a permanent disability rating. If your Honor please, the state of the record now shows this. On the question of special damages, it shows a loss of wages, and for your Honor's convenience I had this typed up.

The Court: Thank you. I would appreciate that very much.

Mr. Bloom: The special damages are listed under paragraph 1, totalling \$8081.19. That includes the loss of wages at \$4,700, the ambulance at \$115, and the stipulated medical, physicians, \$946.93, and hospitalization at \$2,319.26. That is the proof that is now in evidence.

Now in respect to the other items designated there at the appropriate time, or if your Honor desires, we would like to say a few words on that with respect to general damages.

At this time, if your Honor please, I would like to either read into evidence or offer in evidence

(Testimony of John Philip White.)

for your Honor's [21] convenience the official publication of the Federal Security Agency, United States Public Health Service, National Office of Vital Statistics, in respect to the life expectancy of white males in the United States, and I particularly refer to page 34, Table 5.

The Court: Is that the standard mortality table?

Mr. Bloom: Yes, if your Honor please, this is the official United States publication. The two ages that we are concerned with here would be the life expectancy, the age—that is, as of the time of the accident, which would be 35 to 36, showing an average future life expectancy of 34.36 years. We are also concerned with the life expectancy as of the present time—that is, the future life expectancy, the probable special damages and the medical likely to be incurred. The age there would be 40 to 41, and the life expectancy, if your Honor please, would be 30.03 years now. If your Honor wishes, I could leave this here. Otherwise, perhaps reading it in evidence in this manner would be sufficient.

The Court: There is no specific objection, I think the reading in evidence of the tables will be sufficient for my purpose. Unless counsel for the Government has a specific objection?

Mr. Scholz: Yes, your Honor, I didn't see this before. I would like to look this over and probably I won't have any objection, so let's read that in and then I can look this over [22] and tell your Honor

(Testimony of John Philip White.)

and then there—if there is no objection, it may be read into evidence and may be admitted.

The Court: All right, sir. [22-A]

The Court: Does the plaintiff have occasion to use a cane in the ordinary course of his travels?

Mr. Bloom: The evidence showed, if your Honor please, that the plaintiff used either crutches or a cane intermittently for the past four and a half years, from the time of the accident up to November, and I presume that that condition exists whenever there is a flare up.

Q. Is that correct, Mr. White?

A. That is true.

The Court: That relieves the pressure on the ball of your foot, does it?

A. Yes, sir.

Q. Do you have a constant pain, Mr. White, or is it a recurring pain?

A. I have a constant pain. It is enough for me to be conscious of it.

Q. Could you describe it for me.

A. Well, whether I have a shoe on or not, Judge Harris, I feel that I have a shoe on. The shoe is ill-made. It is a pigeon-toed shoe.

Q. You had that specially made?

A. No, that is the shoe that I feel that I have on.

Q. I see. Are you required to buy special shoes or have special shoes constructed for your foot?

A. I have had some special shoes constructed. However, I found [23] the greatest satisfaction in

(Testimony of John Philip White.)

the Health Spot shoes which Dr. Morrissey recommends.

Q. He recommended a special shoe?

A. Yes. It is Health Spot Shoe. But I feel as though I have on a shoe that is about a half size too small and has a toe pointed inward.

Q. Do you have a constant drainage from this ulcerated condition?

A. Not constant. I would say that approximately 50 per cent of the time there is some drainage of either blood or pus. Dr. Morrissey recommends that except on those——

Q. Do you use an inner sock of any kind?

A. I wear a bandage.

Q. How big is this ulcerated condition or this sore itself?

A. It varies from something—I will start immediately after getting out of the hospital. It doesn't exist. I don't think I have ever been out of the hospital more than two weeks before this started again. Two weeks of even limited activity on my feet will start the ulcer again, and it starts off about the size of the head of a pin, and when it is at its worst, it may be as big as a nickel.

In addition to the ulcer itself, there is always accompanying it great callus. It is rather difficult to tell where the callus ends and the ulcerated portion begins, but I have a practically constant callus on that side of the ball of [24] my foot.

Q. You use a car in the course of your business enterprise, do you?

(Testimony of John Philip White.)

A. Yes, sir. I not only use a car but I used to have another car, and Dr. Morrissey told me I couldn't drive a car any more unless I got a car without a clutch.

Q. You use a hydromatic?

A. I have a hydromatic, without a clutch, and Dr. Morrissey has specifically forbidden me to drive a car with a clutch.

Mr. Scholz: I think that is hearsay, your Honor.

The Court: Overruled.

The Court: How often do you see Dr. Morrissey in the course of a year?

A. That varies, your Honor. However, whenever the level of pain rises above what I have grown to consider normal, I go to see Dr. Morrissey, and sometimes the condition has been such that he will say, "I want to see you Monday." I go there either on Monday, Wednesday or Friday, and he will want to see me on his next working day, and I have seen him on successive working days for as much as three times in a row. Sometimes he will say, "Come back next week." I have seen him every week or fairly long periods. I have been seeing him once a week. However, I was in the hospital in April, I got out in May, and I went to see him ten days after I got out of the hospital, at which time he said, "Well, it looks pretty good. Come back to see me again if [25] you feel any worse."

Q. Has he been in attendance as you have indicated since the accident, Dr. Morrissey? Was he your original physician?

(Testimony of John Philip White.)

A. No, sir, the original physicians were doctors Moore and Halter and Wilkie. However, it was about seven months after the accident that Dr. Moore and his associates made some mistakes, and Dr. Morrissey has been in charge ever since.

Q. He is a very capable man, Dr. Morrissey?

A. I think so.

Q. What is this business that you have now? Is that your own business?

A. Yes, sir, it is my own business, and in view of the fact that I was no longer able to be as active as I have been in the past I couldn't see the number of customers. When I was working as a salesman, I used to have to see 20 or 30 people a day, which is a matter of parking the car and walking—it may be only a block between the——

Q. That is when you worked for the Mars Metal Company?

A. Yes, sir. Now I am specializing and confining myself to the purchase of waste materials, for which I see some profitable use from large industries, where they can be bought in large quantities, and, as I say, Mars Metal Company have an agreement with them to process the materials that I purchase. However, the materials are purchased by me. I am not a salesman for Mars Metals. The materials are purchased by me, and most [26] of them are at the moment processed by Mars Metal Company. That is not true of all of them. I have some other arrangements on some other materials.

Q. Does your wife assist you?

(Testimony of John Philip White.)

A. Yes, my wife assists me. My wife does a certain amount of bookkeeping or record keeping for me. However, I have the use of a stenographer. I have an office.

Q. Where do you maintain your office?

A. 1675 Calvin Street.

Q. Do you have any employees there?

A. No. My rent includes the use of a stenographer. My statement that it was difficult to say what I was making at the moment was not an evasion. The business is such that at the moment I am drawing \$600.00 a month out of the business.

Q. You say business is pretty good now?

A. The business looks promising.

Q. There is a good market for scrap material at the present time?

A. Yes, sir, but I am not handling actually scrap. I am handling waste materials, much of which is speculative materials, which have been previously discarded completely. We think things are going to be pretty good, but it is still speculative, and I only draw a limited sum out of the business.

The Court: I have no further questions. Mr. Scholz, do you have any questions. [27]

Mr. Scholz: No further questions of this witness.

Q. (By Mr. Bloom): Mr. White, did you say you were drawing out \$600.00 a month, or a week?

A. A month.

Q. You meant a month, all right.

Mr. Bloom: If your Honor please, that is the

only testimony that we expect to offer. We had Mr. White, in accordance with your Honor's suggestion, examined by an Army or Government doctor. We have not received any copy of the medical report from the doctor, but I presume that Mr. Scholz has such a report. He has told me that he has that report.

Mr. Scholz: Yes, the report came in while I was down at Ft. Ord. I can say this briefly, your Honor, that it finds practically the same as Dr. Morrissey.

The Court: You are satisfied with the medical?

Mr. Scholz: I am satisfied with Dr. Morrissey.

Mr. Bloom: If your Honor please, I am wondering if it would not be advisable to have that medical report before the Court.

The Court: I am satisfied with Dr. Morrissey's testimony. I have a very high regard for Dr. Morrissey. I have had him in court many times, and invariably I have found he is not only accurate in his findings, but very forthright in his presentation of the evidence.

Mr. Scholz: I think he is fair to the Government and fair [28] to the plaintiff.

Mr. Bloom: I made this suggestion because I had reason to believe that this is one of those unusual situations where the doctors on the other side might even go further than the plaintiff's own doctors.

The Court: I can't certainly compel Mr. Scholz to disclose it if he is not willing to present it to the Court. He is resting within his rights, of course.



Mr. Bloom: Very well, your Honor. I take it, then, your Honor's suggestion or ruling was not an order to have—well, just cover the examination, that is true, not the production of a report.

The Court: Now, the second item that you have here, Mr. Bloom, is one of pain and suffering, disfigurement, interference with activity at the rate of \$750 per year for his life expectancy. What is the basis for that accounting?

Mr. Bloom: That paragraph 2, if your Honor please, of course, is the one speculative part of our request for damages. How to assess it, of course, is a difficult thing to determine. What we are purporting to do there is to reduce mathematically, to mathematics, somehow or other, the compensation which the law, of course, entitles this man to, namely, prospective pain and suffering, and disfigurement, interference with his normal activities such as running, climbing, bowling, and so forth, from the time of the accident, namely, November 22, 1946. The [29] testimony, I think, is pretty clear that this man is going to sustain trouble for the rest of his life, a certain amount of pain, a certain amount of suffering, this disfigurement will be there, the shortening of the right foot, the right toe is there, that is permanent. The ulceration is recurrent. That is permanent. And therefore he is entitled, I think, to some compensation for his life expectancy, in view of the permanency of this disability. We have selected arbitrarily a figure of \$750.00 per annum as compensation for that type of

thing, and while I realize that the multiplication of that figure by the 34.36 years gives a rather substantial sum, namely, \$25,770.00, nevertheless I think the sum of \$750.00 per year for this type of suffering, pain, interference with activities is not an exaggerated amount for the injuries sustained. I doubt if any of us—well, I know none of us would be willing to accept a figure of that amount for the penalty of suffering this kind of disability and interference with his activities and life.

As far as the third paragraph here is concerned, if your Honor please, we are not dealing in speculation. I do not think there any speculation would be of a most limited character. We are asking there for prospective and probable loss of wages of \$250.00 per year, plus medical and hospitalization costs of \$750.00 per year, or a total cost of \$1000.00 per year for the life expectancy. Now, this morning, Dr. Morrissey has testified that the medical, the hospitalization for this man's life will probably [30] cost him around from \$500.00 to \$1,000.00 a year. That is his prediction, and I think he is a man eminently qualified to make such a prediction. We have taken a sum of \$250.00, which is an arbitrary sum, to be sure, to cover the loss only while White will be hospitalized or undergoing total immobilization during the prospective years, and we took the low figure of \$250.00 because that is the only figure on which we have any evidence; that is his commencing salary at the time of the accident, the very low figure, the lowest figure in evidence, although his pain and suffering later went up to \$600 or

\$700 per month. We take the initial figure of \$250.00, and that, with Dr. Morrissey's testimony that the prospective hospitalization and medical will be \$500 to \$1000 is for the rest of this man's life, which from today on, namely, July 11, 1951, will be 34.36 years, and we have a total of \$30,030 for prospective loss, mostly medical hospitalization, out of pocket expenses, which an authority of Dr. Morrissey's eminence places at \$500 to \$1,000 per year. The total figure, if your Honor please, of \$63,881.19, is the amount prayed for now in the second amended complaint, and that is the method whereby that sum has been calculated.

The Court: Do you have any observations to make, Mr. Scholz?

Mr. Scholz: Just very briefly, your Honor this: I do not recall exactly the loss of wages, but it seems to me that is rather high. I am talking about the special damages. The [31] ambulance and the rest of it is all right. The pain and suffering—that is something the Court will have to decide.

The Court: Mr. Scholz, so there will be no misunderstanding as to the loss of wages that has been paid, \$4,700 has been paid.

Mr. Bloom: That is the actual loss sustained.

The Court: That is the loss sustained.

Mr. Scholz: Paid by the Industrial Accident Commission.

Mr. Bloom: No, that is out of pocket loss that the man sustained.

The Court: Do you have any objection to that?

I should like to hear a specific objection to it. There is testimony in support of it.

Mr. Bloom: The testimony is uncontradicted, and we supplied, at Mr. Scholz' request, some documents from the company for interpretation.

Mr. Scholz: That is correct, and that is why my impression was that was not correct. It is only an impression. I can't say yes or no because I do not have in mind what the testimony was, but that is my impression that it did not amount to that much. The rest of the items I think are all right. Pain and suffering is entirely up to the Court. I believe the prospective *wages* is too high for this reason. It appears Mr. White is making as much, even more now than he did before. It is true that he testified that his business was such that he could not tell how much he is making, but I am inclined to view that with [32] a little apprehension because it seems to me that any person in business should have records and be able to tell. I do not think that the testimony would support a \$30,000 loss of wages.

The Court: Of course, Dr. Morrissey points out, somewhat guardedly, of course, because the prognosis reaches into the future, that more serious consequences may flow in the wake of this ulcerated condition and, of course, I am mindful that the doctor is very conservative in his usual testimony. But that must also be considered, isn't that correct, Mr. Bloom?

Mr. Bloom: That is my understanding, if your Honor please.

Mr. Scholz: My understanding was if there is testimony that he had an ulcerated, trophic ulceration of the foot, and I do not think there is any question of doubt in my opinion—in fact, it was confirmed by the Letterman General Hospital.

The Court: He indicated it might get into the bony structure.

Mr. Scholz: He said it might, but as I recall his testimony now—I am speaking partly from memory and my memory sometimes is not too good—that it is a possibility. The outside of the toe, he had no difficulty from that.

The Court: He said it might get into the deeper tissues.

Mr. Scholz: It might. Anything is possible, your Honor.

Mr. Bloom: Since I asked the question I think I remember these answers. The testimony is the ulcer is fairly deep, that there might be infection. There is hostility, to use his [33] language, of infection of the bony structure, and in such event amputation might be necessary.

Mr. Scholz: Any doctor will testify that anything is possible. There is no such thing as physical impossibility so far as health is concerned. I may be dead here in a half hour.

The Court: What does your doctor say about that as to the future prognosis?

Mr. Scholz: “It is expected that the trophic ulceration which he had in the past will recur. I believe this disability is permanent enough to prevent this man from engaging in any activity in the fu-

ture which will require standing or walking for more than the minimum period at a time."

Mr. Bloom: Is there anything said about amputation?

Mr. Scholz: No, there is not a thing said in there. I might as well read it. I have no objection.

"Physical examination at this time reveals a well nourished, well developed individual. Examination was confined to the lower extremity. On ambulation the patient walked with a limp because of inability to correctly bear weight on the left foot. This was more noticeable without shoes than with shoes. Examination of the right leg and foot revealed a well healed scar that was non-tender and non-adherent over the upper anterior lateral aspect of the right leg. There was a normal range of right knee motion, right ankle motion, subtalar and mid-tarsal motions. Motions of all the [34] toes were normal actively and passively except for the great toe, in which case there was almost complete loss of plantar flexion. The right great toe is  $\frac{1}{2}$ " shorter than the left, the shortening being in the 1st metatarsal. There is crepitus in the interphalangeal joint of the right great toe on motion. This is subjectively painful. There is some pronation of the longitudinal arch and depression of the metatarsal arch of the right foot. There is a  $2\frac{1}{2}$ " scar running diagonally across the dorsum of the right foot over the 1st metatarsal. There is numbness over the entire right great toe except for the proximal portion of the lateral aspect. X-rays of the right foot reveal a well healed fracture in good position and

alignment of the 1st metatarsal right foot with approximately  $\frac{1}{2}$ " shortening. There is a punched-out area in the head of the proximal phalanx of the 4th toe. Examination of the left knee showed a normal range of motion. There is some loss of dorsi-flexion of the left ankle. The dorsi-flexion was limited to 90 degrees. The plantar flexion was normal. The foot had a rather cyanotic appearance and felt colder than the right foot. Passive motion of the interphalangeal and the metatarsal phalangeal joints was normal. However, there was some loss of active motion in these joints. The range of motion in the subtalar and mid-tarsal joints was normal. However, dorsi-flexion of the foot caused pain on the dorsum of the foot in the region of the tarsal metatarsal joints. There was a 1x3" irregular scar posterior to the medial [35] *malleolus*. This scar was somewhat tender to touch, apparently because of a neuroma of the posterior tibial nerve. There was a 4 $\frac{1}{2}$ " longitudinal healed surgical scar posterior to the lateral malleolus and distal portion of the fibula which was also tender to palpation, apparently because of a neuroma of the serral nerve. There was a 2" transverse scar on the dorsum of the left foot over the etatarsal heads. This scar was non-tender. There was a 1" scar over the medial aspect of the left foot which also was non-tender but somewhat adherent. There was a callus on the medial aspect of the left great toe and a large callus with some evidence of hemorrhage beneath the head of the 5th metatarsal, left. There was an excoriation beneath the head of the

1st metatarsal left. The cutaneous sensation was altered as follows: There was marked hypersthesia (increased sensitivity) distal to the lateral malleolus and over the lateral aspect of the foot and the lateral aspect of the dorsum of the left foot. There was marked hypesthesia (decreased sensitivity) over the entire plantar surface of the left foot. X-rays of the left foot reveal several small radio opaque foreign bodies, probably metallic fragments, in the region of the medial malleolus.

“In my opinion this man has a well-healed fracture of the 1st metatarsal, right, with  $\frac{1}{2}$ ” shortening. This has produced disordered weight bearing, resulting in a depression of the metatarsal arch and the longitudinal arch. This is a permanent [36] disability of a mild type. In my opinion, he has had damage to the posterior tibial and serral nerves of the left foot and leg in the region of the ankle, and at the present time has a neuroma of these nerves at the ankle region with loss of nerve fibers to the plantar surface of the foot. Because of this loss of sensation to the foot, it is expected that the trophic ulcerations which he has had in the past will recur. I believe this disability is permanent and severe enough in nature to prevent this man from engaging in any activity in the future which will require standing or walking for more than minimal periods at a time.”

The Court: The summary of your theory on damages and the testimony in support thereof, as referred to in the transcript, is embraced on page 13 of your opening brief and the resume you



handed me today, the computation, is substantially, the same, is it not, counsel?

Mr. Bloom: Yes, your Honor, except in going over the transcript a few nights ago I notice I had omitted one or two operations on the man.

The Court: I noticed he had five operations in all.

Mr. Bloom: He had seven, really. He had seven operations. Dr. Morrissey, for example, operated on the seral nerve twice, at his office and later took out some shrapnel fragments from the heel—well, from some place in the foot. In any event, there were seven operations instead of five. Aside from that I [37] think it is substantially accurate.

The Court: The matter may stand submitted, gentlemen.

Mr. Bloom: If your Honor please, do I understand that counsel has no objection to the introduction of this——

Mr. Scholz: No objection to your reading from the United States actuary tables.

The Court: We will recess until 2:00 o'clock.

(Whereupon a recess was taken until 2:00 o'clock p.m.) [38]

## REPORTER'S TRANSCRIPT

### Plaintiff's Motion to Complete Record

Wednesday, October 3, 1951

The Clerk: White vs. United States of America.

Mr. Scholz: If your Honor please, we can see no particular objection to the order Mr. Bloom

sent to us was that we stipulate to the filing of the wants here. The only objection was, the stipulation second amended complaint, and the office of the United States Attorney, and myself in particular, felt that we couldn't do that. That came up at the last minute. Your Honor did make an order at that time that it could be filed, but we didn't feel that we could stipulate to it.

As far as the letter that he wants to introduce, it would seem to me, personally, that he should have it before your Honor so you can fix the responsibility or the ultimate judgment to be obtained by the lienholder or Mr. White himself.

Mr. Bloom: If your Honor please, the motion was directed to the point of having an order confirming the order admitting the filing of the second amended complaint. We wanted it clarified. The reason for it, I think, is apparent when you read my affidavit in support of the motion. I don't think that the record is entirely clear on that point, particularly since the government has seen fit not to sign the stipulation in question. So, first of all we are going to ask your Honor for the formal order now confirming the figure, and reaffirming the figure of the second amended complaint. [2\*]

The Court: I will make such an order. Do you have a formal order?

Mr. Bloom: Yes, I have. Now, in respect to the letter that sets for the arrangement between the Industrial Indemnity Company, the plaintiff and ourselves; we representing both the insurance carrier and party plaintiff. I think it may be helpful to

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\*Page numbering appearing at top of page of original Reporter's Transcript of Record.

your Honor in the matter of a judgment, so, there being no objection from counsel I now offer in evidence this letter of September 19, 1951, and ask that it be marked Plaintiff's Exhibit next in order.

The Court: So ordered.

The Clerk: Plaintiff's Exhibit next in order admitted in evidence.

(Thereupon, the letter above referred to was admitted in evidence and marked Plaintiff's Exhibit next in order.)

Mr. Bloom: We now tender, if your Honor please, the proposed order which is in accordance with the order attached to the notice of motion and it calls for the reopening of the case for this purpose, and for the granting of the order, for the admission of the letter in evidence and for the affirmation and reissuance of your Honor's opinions and orders for judgment which are now on file.

The Court: All right, I will have the order submitted. [3]

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[Endorsed]: No. 13226. United States Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. John Phillip White, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed January 9, 1952.

/s/ PAUL P. O'BRIEN,  
Clerk of the United States Court of Appeals for  
the Ninth Circuit.

